

# **The Abuse and Neglect Case:** *A Practitioner's Guide*



**National Association  
of Counsel for Children**

**2009 Texas Training Series**

Sponsored by the Texas Supreme Court Permanent Judicial  
Commission for Children, Youth & Families



SUPREME COURT OF TEXAS PERMANENT JUDICIAL  
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES





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# The Abuse and Neglect Case: *A Practitioner's Guide*

This NACC Texas Training Series Manual was collaboratively created. The NACC particularly thanks the Children's Law Center of Los Angeles, contributing authors, as well as individuals who provided editorial support:

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SUPREME COURT OF TEXAS PERMANENT JUDICIAL  
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Justice Harriet O'Neill, Chair

Tina Amberboy, Executive Director

November 1, 2009

***Letter from Supreme Court Commission for Children, Youth and Families***

Adequate legal representation is essential to ensure the protection of rights that have constitutional dimension. For families to receive satisfactory legal representation, attorneys who represent children and parents need sufficient training and fair compensation. In 2008, the Commission took unprecedented steps to improve the quality of representation through legal education for attorneys representing children and families.

Making sure that families have quality representation is also one of the Commission's top goals in 2009, which is why the Commission approved a study to evaluate several aspects of child and family legal representation, such as:

- Strengths and weaknesses of appointment models.
- Methods, timeliness and duration of appointments.
- Training requirements and methods of evaluation.
- Adequate compensation and funding streams.
- Promising practices in legal representation.

The Commission is also co-sponsoring the annual conference of the National Association of Counsel for Children, a multidisciplinary conference, which will be held in Austin during October 2010, to provide more education about the complex nature of child protection cases. Additionally, in 2009, the Texas Board of Legal Specialization approved the request of the National Association of Counsel for Children (NACC) to offer Child Welfare Law Certification to Texas attorneys.

The Commission will continue to strive for higher quality legal representation in 2009 and beyond using CIP Training grant funds for attorney education.

Sincerely,

A handwritten signature in black ink that reads 'Tina Amberboy'.

Tina Amberboy  
Executive Director





# Introduction

What one commentator has called “the modern era of child protection” in the United States has been in place for less than 50 years.<sup>1</sup> A 1962 federal amendment to the child welfare provisions of the Social Security Act required each state, as a condition of receiving federal funds for certain programs, to obtain a judicial finding for a child being placed in foster care that the child’s remaining in the home would be “contrary to the welfare” of the child.<sup>2</sup> This pattern of federal mandates, intended to improve the system and tied to the threat of penalties if the states (including state agencies as well as the courts) failed to meet federal requirements, continues to be a driving force behind many of the issues discussed in this manual.

In addition to thirty years of case law affecting child protection cases nationally and in Texas, there are several significant pieces of federal legislation that govern how child protection cases are handled by each state. The Child Abuse Prevention and Treatment Act of 1974 (CAPTA), was the first major piece of federal legislation dealing with abuse and neglect of children.<sup>3</sup> Reauthorized many times, its primary purpose continues to be providing federal funds to states to assist with prevention, investigation, prosecution, and treatment of child abuse and neglect cases. Another significant federal law is the Adoption and Safe Families Act (ASFA), passed by Congress in 1997.<sup>4</sup> Finally, Congress recently enacted the Fostering Connections to Success and Increasing Adoptions Act of 2008 (H.R. 6893). This act, now being implemented, has similar far reaching impact on Texas practice. CAPTA, ASFA, and the Fostering Connections Act will be discussed as they relate to the various aspects of child welfare agency policy and practice, including the effect each act has on an attorney’s efforts to competently represent a child or parent client.

Passed in 1974, CAPTA was the first law to impact advocacy for children because it mandated that each child placed in care be appointed a “guardian *ad litem*” (GAL) to represent his or her interests.<sup>5</sup> The same year marked the birth of the Texas Family Code, which became effective on January 1, 1974. By 1977, certain statutory procedures provided for child protective cases by the Texas Family Code were declared unconstitutional, and the process of amendment and elaboration was under way.<sup>6</sup> Although the Texas Family Code, in compliance with CAPTA, required the appointment of a guardian *ad litem* (GAL) to represent the interests of a child, a panel of three federal judges in *Sims v. Dep’t of Public Welfare* declared that Section 11.10 of Title 2 of the Texas Family Code violated the due process clause of the Constitution by not requiring the appointment of an attorney for the child.<sup>7</sup> As a result, the Texas Family Code was amended to require that the trial court in a child protection case appoint *both* a GAL *and* an attorney *ad litem*.<sup>8</sup> In 1995, the Texas Legislature enacted Texas Family Code Section 107.0125 to allow courts to appoint a lawyer in the dual role to serve as both the GAL and the attorney *ad litem* (AAL) for a child-client.

Although the decision in *Sims* was reversed by the U.S. Supreme Court on other grounds, the trend, particularly in federal courts, has been toward more judicial intervention in the protective services system than had been the case for prior decades. This trend is evidenced by the U.S. Supreme Court rulings which establish that, under the Due Process Clause of the Fourteenth Amendment, parents have a fundamental liberty interest in directing the

1 John E. B. Myers, *A Short History of Child Protection in America*, 42 Family L.Q. 449, 454 (Fall 2008).

2 Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?* 42 Family L.Q. 481, 483 (Fall 2008).

3 Child Abuse Prevention and Treatment Act (CAPTA), 1974 (P.L. 93-247).

4 Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(c).

5 Child Abuse Prevention and Treatment Act (CAPTA), 1974 (P.L. 93-247).

6 *Sims v. State Dep’t of Public Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977) *rev’d sub nom. Moore v. Sims*, 442 U.S. 415 (1979).

7 *Id.* 438 F. Supp. at 1194.

8 Tex. Fam. Code §§107.011 and 107.012

upbringing of their children.<sup>9</sup> The state can only infringe on this relationship for compelling reasons in limited circumstances. The United States Supreme Court stated in *Lassiter v. Department of Social Services*:<sup>10</sup>

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>11</sup>

Although *Lassiter* did not impose a constitutional right to court-appointed and publicly-funded counsel in protective services cases involving termination of parental rights, Texas provided a statutory right to appointment of counsel for indigent parents in 1995.<sup>12</sup>

The Adoption Assistance and Child Welfare Act (AACWA) of 1980<sup>13</sup> established a new Title IV-E Foster Care and Adoption Assistance entitlement program, and specified that states' agencies must make "reasonable efforts" to prevent the removal of a child and to reunify families. The Act created state plan requirements that had a major influence on the development of state child welfare systems.

The Adoption and Safe Families Act is another important piece of federal legislation governing child protection cases.<sup>14</sup> The overall goal of ASFA is to improve the safety of children, promote adoption and permanency for children, and support families. Its influence on child welfare practice and the Texas Family Code since its passage has been significant.

There are three ASFA requirements that can affect an attorney's ability to advocate for a parent or a child effectively. First, ASFA required that states initiate termination of parental rights based on a child's length of stay in foster care. Texas was way ahead of ASFA in 1997, and during the 75th Legislative Session, Texas amended the Family Code by adding Section 263.401, which required the parties in the case to achieve permanency for a child in care within 12 months from the date the Texas Department of Family and Protective Services was granted conservatorship of the child, with one six-month extension potentially available. In practice, the state ordinarily files a suit affecting the parent-child relationship with termination pleadings and termination of parental rights is later prosecuted or resolved well within ASFA guidelines.

ASFA also required states to hold permanency hearings to determine the permanency plan, i.e., whether a child would return home, be adopted, placed with a relative or remain in long term care. Again, Texas was proactive in this regard and in 1995 enacted Subchapter D of Chapter 263, which requires more frequent Permanency Hearings than required by ASFA until permanency for a child is reached.

Finally, ASFA modified the reasonable efforts standard that child welfare agencies were required to make to preserve and reunify families. The Texas Family Code requires a court to make reasonable efforts findings at every hearing conducted pursuant to Chapters 262 and 263.<sup>15</sup> The implications of ASFA and the provisions of the Texas Family Code enacted to both comply and go beyond ASFA will be discussed throughout this document.

Recently, the U.S. Congress enacted the newest federal legislation regarding child protective services, the Fostering Connections to Success and Increasing Adoptions Act of 2008 (H.R. 6893). The main goals of this legislation are to promote permanency for foster children through adoption and guardianship with relatives; to improve education and health care for foster children; to ensure a successful transition to adulthood for older foster youth; and to increase federal support and protection for Native American children in foster care.

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<sup>9</sup> See e.g. *Quilloin v. Walcott*, 434 U.S.246, 255 (1978); *Cleveland Board of Education v. LaFluer*, 414 U.S.632, 639 (1974).

<sup>10</sup> *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981)

<sup>11</sup> *Stanley v. Illinois*, 405 U.S. 645, 651.

<sup>12</sup> Tex. Fam. Code § 107.013.

<sup>13</sup> Pub. L. No. 96-272.

<sup>14</sup> ASFA, 42 U.S.C. § 675

<sup>15</sup> Tex. Fam. Code. §§ 262.107, 262.201, 263.201, 263.303, 263.503.

The Fostering Connections Act imposes important new mandates on state child welfare systems, including:

- Notice to relatives — state child welfare agencies must exercise due diligence to notify grandparents and other relatives within 30 days of a child's removal from home.
- Sibling placement — state agencies must make reasonable efforts to place siblings together unless this is contrary to one or more sibling's safety or well-being; if siblings are placed apart, state agencies must make reasonable efforts to provide visitation and other contact unless contrary to their safety or well-being.
- Health care coordination — each state must have a plan for oversight and coordination of foster children's health care.
- Educational stability — state agencies must keep children in the school they attended at the time of removal, unless contrary to the child's best interests; for children who change schools, state agencies must immediately enroll them and provide educational records to the new school.
- Transition-age youth — state agencies must provide Independent Living Program services to older foster youth, and develop a transition plan 90 days before jurisdiction is terminated.

In addition to these requirements, the Fostering Connections Act creates several new state options that will be implemented in Texas, including federally supported financial assistance for relatives who become permanent managing conservators, and federal foster care funding for youth ages 18–21.

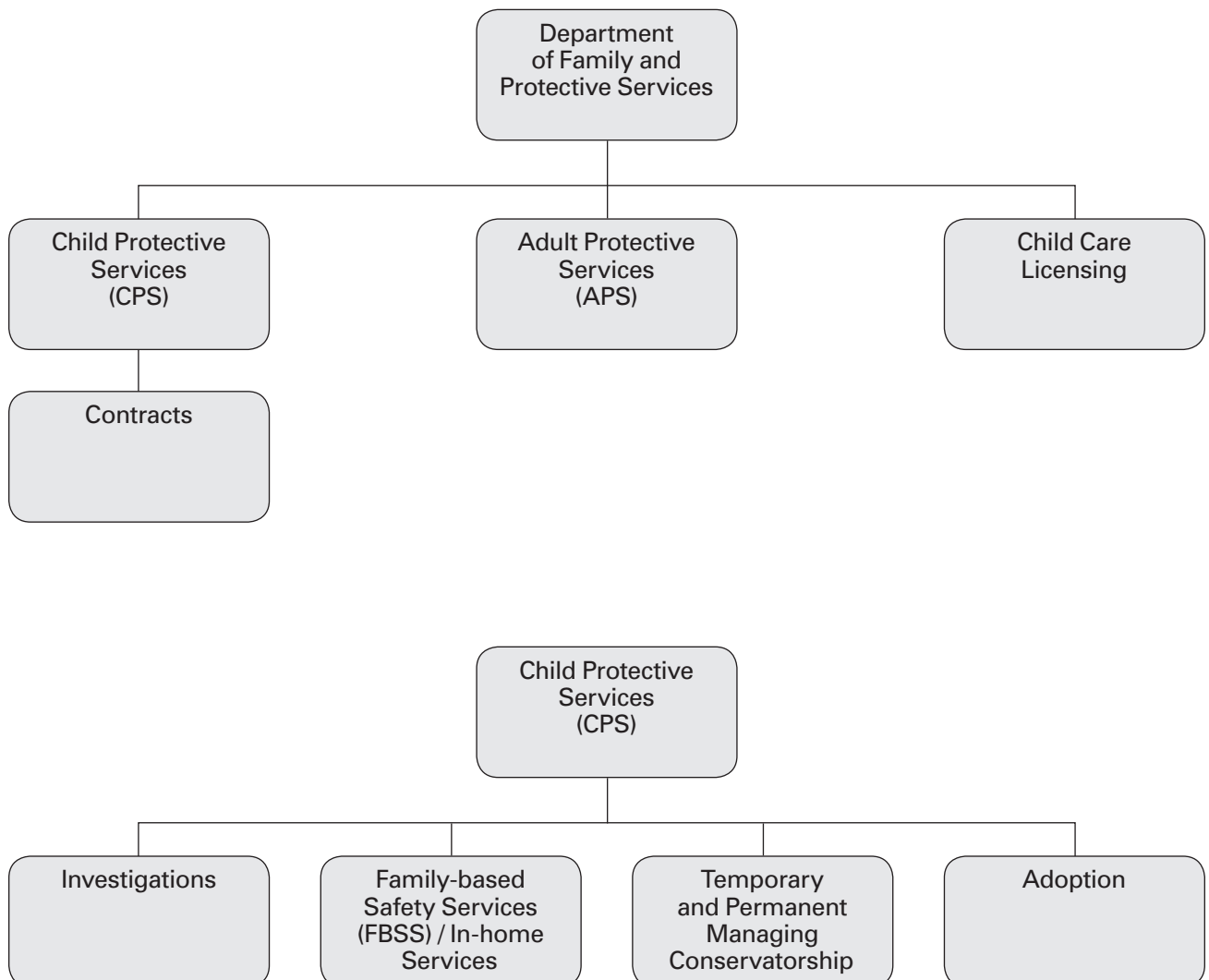
During the 2009 Texas legislative session, two bills were passed authorizing DFPS to create a kinship guardianship program pursuant to the Fostering Connections Act. Senate Bill 2080 and House Bill 1151 both contain provisions to implement the Permanency Care Assistance Program. The program will provide financial assistance equal to or less than foster care rates to relatives who assume permanent custody for children in the state's conservatorship, but only if the relative becomes a verified foster home and the child resides with the relative for at least six months before being appointed as the permanent managing conservator. Rules must be adopted to establish eligibility requirements to receive permanency care assistance benefits and to ensure the program conforms to the requirements for federal assistance pursuant to the Fostering Connections to Success Act.<sup>16</sup>

<sup>16</sup> Tex. Fam. Code §§264.760, and 264.851 et seq.



## Child Welfare Agency Organizational Structure

The Texas Department of Family and Protective Services, through its Child Protective Services (CPS) division, is the agency responsible for protecting children. CPS investigates reports of abuse and neglect of children, provides services to children and families in their own homes, places children in foster care, provides services to help youth in foster care make the transition to adulthood, and places children in adoptive homes. Until 2003, the Department of Family and Protective Services was known as the Department of Protective and Regulatory Services, and the Texas Family Code in some sections still refers to the Department by the previous agency title. In this manual, DFPS and its division, CPS, often will be referred to as “the Department.”



## Texas Judicial System

### Court Structure

The basic structure of the present court system of Texas was established by an 1891 state constitutional amendment. The amendment established the Supreme Court, the highest state appellate court for civil matters, and the Court of Criminal Appeals, which makes the final determination in criminal matters. There are 14 courts of appeals which exercise intermediate appellate jurisdiction in civil and criminal cases.

The state trial courts of general jurisdiction are the district courts. In addition to these state courts, the Legislature has established statutory county courts, designated as county courts at law or probate courts, in the more populous counties. These statutory county courts are in addition to the county court in each county established by the state constitution. Though most of these statutory county courts primarily assist the constitutional county judge, who has probate and misdemeanor jurisdiction, many of these statutory county courts also have concurrent jurisdiction with the district courts in some matters, including family law and child protection cases.<sup>1</sup>

### Specialty Courts

Specialty child protection courts were created in Texas to assist trial courts in rural areas in managing their child abuse and neglect dockets. Like child support associate judges, also known as Title IV-D judges, the associate judges who hear child protection cases are appointed by regional administrative presiding judges. Although the child protection court judges receive their appointments from the regional administrative presiding judges, they are state employees of the Texas Office of Court Administration. At the discretion of the regional administrative presiding judge, visiting judges may also be appointed to hear these cases in lieu of associate judges.

Child protection specialty court judges solely hear child abuse and neglect cases. Currently, there are 17 child protection specialty courts operating in 130 counties. In fiscal year 2008, these courts held 23,687 hearings and issued 5,429 final orders.<sup>2</sup>

## Timeline of Legal Case — Statutorily Mandated Road to Permanency

### Brief Overview of DFPS Legal Case Timeline

Day	Legal Event
0	DFPS appointed TMC
14	1st Adversary Hearing
60	Status Hearing
180	1st Permanency Hearing
300	2nd Permanency Hearing
Between 300 and 365	Trial/Final Order*
1st Monday after Day 365	Dismissal Date; trial on merits commenced unless dismissal date extended
Between 365 and 540	Trial/Final Order if dismissal date extended*
420	3rd Permanency Hearing if dismissal date extended
540	Final Dismissal Date

\* IF CHILD REMAINS IN FOSTER CARE, HEARINGS, CALLED PLACEMENT REVIEW HEARINGS TO DISTINGUISH THEM FROM PERMANENCY HEARINGS, MUST CONTINUE AT LEAST EVERY 180 DAYS, AND IN SOME CASES MORE FREQUENTLY FOLLOWING THE FINAL ORDER.

<sup>1</sup> See appendix for more information on the court structure of the Texas judicial system.

<sup>2</sup> Texas Office of Court Administration. For more information on the specialty courts available at <http://www.courts.state.tx.us/courts/specialty.asp>

**Detailed Overview of CPS Legal Case Timeline**

Day	Activities Required	Discussion and Comments <sup>3</sup>
	Emergency removal without court order. §262.104	If the emergency possession is without a court order, an ex parte hearing must be held on the “first working day” but no later than 3 days after the removal. §262.106.
	Possession with intent to return to caretaker.	Whether the possession is by police under §262.007 or the Department under §262.110, the Department has <i>five</i> days to either return the child or file suit.
0	Emergency removal (with prior ex parte order)	The 365-day clock starts when the Department gets Temporary Managing Conservatorship (TMC), which may be ex parte. §105.001(h). Appointment of <i>ad litem</i> (GAL & AAL) for the child required immediately after filing. §§107.011 & 107.012. Removal and TMC order may also be <i>after</i> an adversary hearing. §262.205
0	Initial hearing and order; may be §262.106 hearing, or “full adversary hearing.”	If the child remains in care, the court must appoint the Department as TMC and start the clock.
14 [or 0]	“Full adversary hearing” — temporary orders or return to parent required. §262.201	Court must inform each parent in open court that parental rights may be restricted or terminated unless the parent is willing and able to provide a safe environment for the child. §262.201(c); §262.205(c) (2). Appointment of counsel for indigent parent who responds in opposition to the Department’s lawsuit required if Department seeks termination or TMC. §262.013(c). DFPS must file redacted copy of §261.307 child placement resources form and explanation of why placement not made with designated caretaker. §262.114(a-1) & (a-2). If form not filed, court must require parent to complete and file the form at hearing. §262.201(c).
15	Request for identification of court of continuing jurisdiction; motion to transfer. §155.201 et seq.	If the court has rendered temporary orders, the Department must request the identity of Court of Continuing Jurisdiction. §262.202.  Motion to transfer may be filed outside the time limits in Chapter 155. §262.203(b).  The court hearing the Department’s case may determine the transfer issue if transfer is mandatory §262.203(a) (2); transfer is not required until the CPS case has been resolved if the basis for transfer is a divorce suit filed in another county. §262.203(c).
45	File service plan	The Department must file its service plan. §263.101.
60	Status hearing	Court must hold hearing to review child’s status and the service plan within 60 days after TMC is awarded. §263.201.  Requirement includes child in Texas Youth Commission custody. §263.002(2).  Unless child is in adoptive or other permanent placement, DFPS must file redacted copy of §261.307 child placement resources form 10 days before hearing. §263.003.  Court must inform each parent in open court that parental rights may be restricted or terminated unless the parent is willing and able to provide a safe environment for the child. §263.006.  Court must conduct a “judicial review of medical care” as mandated by §266.007; the foster child shall be provided an opportunity to express to the court the child’s views of the medical care being provided. §266.007(c)

<sup>3</sup> All cites in timeline refer to the Texas Family Code unless otherwise noted.

Day	Activities Required	Discussion and Comments <sup>3</sup>
170	Permanency Progress Report and Notice of Initial Permanency Hearing	<p><b>Notice</b> of the first permanency hearing must be given at least 10 days prior to the hearing to foster parent, “preadoptive” parent, relative caretaker, <i>ad litem attorney</i>, CASA, and other listed interested persons. §263.301(b).</p> <p>A copy of the Department’s permanency plan must be given to each of the persons entitled to notice at least 10 days prior to the permanency hearing. §263.3025(a).</p> <p>The Department is not required to search for relatives if the child has been abandoned under the “Baby Moses” law and the Department does not have information concerning the identity of the child or the child’s parents. §263.3025(a).</p> <p>The permanency progress report must (1) recommend that the suit be dismissed, or (2) recommend that the suit continue and : (A) identify the dismissal date; (B) provide: (i) the name of any person entitled to notice under Chapter 102 who has not been served; (ii) a description of the efforts by the department or another agency to locate and request service of citation; and (iii) a description of each parent’s assistance in providing information necessary to locate an unserved party; (C) evaluate the parties’ compliance with temporary orders and with the service plan; (D) evaluate whether the child’s placement in substitute care meets the child’s needs and recommend other plans or services to meet the child’s special needs or circumstances; (E) describe the permanency plan for the child and recommend actions necessary to ensure that a final order consistent with that permanency plan, <u>including the concurrent permanency goals contained in that plan</u>, is rendered before the date for dismissal of the suit under this chapter; (F) with respect to a child 16 years of age or older, identify the services needed to assist the child in the transition to adult life; and (G) with respect to a child committed to the Texas Youth Commission or released under supervision by the Texas Youth Commission: (i) evaluate whether the child’s needs for treatment and education are being met; (ii) describe, using information provided by the Texas Youth Commission, the child’s progress in any rehabilitation program administered by the Texas Youth Commission; and (iii) recommend other plans or services to meet the child’s needs. §263.303(b). The report should include a summary of medical care for the child, or a separate summary should be distributed to the court and the persons listed in §266.007(b).</p> <p>A parent or attorney for either the parent or the child may file a response to the permanency report not later than 3 days prior to the hearing. §263.303(c).</p>



Day	Activities Required	Discussion and Comments <sup>3</sup>
180	Initial Permanency Hearing. §§263.304; 263.306	<p><b>Court must review</b> locating/service efforts, <i>including cooperation of parties before the court.</i> §§263.301(c); 263.306(a) (2) &amp; (3).</p> <p><b>Child must attend</b> unless specifically waived by court. <u>A child committed to the Texas Youth Commission may attend a permanency hearing in person, by telephone, or by videoconference.</u> The court shall consult with the child in a developmentally appropriate manner regarding the child's permanency plan, if the child is four years of age or older and if the court determines it is in the best interest of the child. §263.302.</p> <p><b>Court must conduct</b> a "judicial review of medical care" as mandated by §266.007; <i>the foster child shall be provided an opportunity to express to the court the child's views of the medical care being provided.</i> §266.007(c)</p> <p><b>Court must inform</b> each parent in open court that parental rights may be restricted or terminated unless the parent is willing and able to provide a safe environment for the child. §263.006.</p> <p>Specific <b>additional duties of the court under §263.306(a)</b>: (1) Identify all persons present at hearing or those given notice but failing to appear; (2) review the efforts of the department to locate and serve necessary persons and obtaining the cooperation of a parent in those efforts; (3) review the efforts of each custodial parent, alleged father, or relative of the child before the court in providing information necessary to locate another absent parent, alleged father, or relative of the child; (4) return the child to the parent or parents if in the child's best interest and parent willing and able to provide the child with a safe environment; (5) place the child with a person or entity willing and able to provide the child with a safe environment in child's best interest; (6) evaluate the department's efforts to identify relatives who could provide the child with a safe environment; (7) evaluate the parties' compliance with temporary orders and the service plan; (8) determine whether: (A) the child continues to need substitute care; (B) the child's current placement is appropriate for meeting the child's needs, whether that placement continues to be in the best interest of the child; and (C) other plans or services are needed to meet the child's special needs or circumstances; (9) if the child is placed in institutional care, determine whether efforts have been made to ensure placement of the child in the least restrictive environment consistent with the best interest and special needs of the child; (10) if the child is 16 years of age or older, order services that are needed to assist the child in transition to independent living; (11) determine plans, services, and further temporary orders necessary to ensure that a final order is rendered before the date for dismissal of the suit under this chapter; (12) <u>if the child is committed to the Texas Youth Commission or released under supervision by the Texas Youth Commission, determine whether the child's needs for treatment, rehabilitation, and education are being met; and</u> (13) determine the date for dismissal of the suit under this chapter and give notice of deadline and hearings.</p> <p>Specific <b>additional duties of the court under §263.306(b)</b>: (1) determine: (A) the safety of the child; (B) the continuing necessity and appropriateness of the placement; (C) the extent of compliance with the case plan; (D) the extent of progress that has been made toward alleviating or mitigating the causes necessitating the placement of the child in foster care; and (E) whether the department has made reasonable efforts to finalize the permanency plan that is in effect for the child, <u>including the concurrent permanency goals for the child</u>; and (2) project a likely date by which the child may be returned to and safely maintained in the child's home, placed for adoption, or placed in permanent managing conservatorship.</p>
290	Permanency Progress Report	DFPS must file a permanency progress report and serve it on all parties at least 10 days prior to each permanency hearing. §263.303.

Day	Activities Required	Discussion and Comments <sup>3</sup>
300	Permanency Hearing.	Court may shorten, but may not extend the 120-day deadline for subsequent permanency hearings. §263.305. Required findings and orders are the same for subsequent as for initial permanency hearing. §263.306(a).
364	Extension order	The court may extend the time by not more than 180 days from the original deadline. §263.401(b). The court may not grant an extension beyond the authorized 180 days. §263.401(c). The parties may not agree to extend the deadlines set by the court. §263.402(a). However, a motion to dismiss made after the court commences the trial on the merits is untimely and waives the objection. § 263.402(b). The court may place the child with a parent for up to 180 days of monitoring without regard to the deadlines, and special rules apply to removals from this “monitored placement” with a parent. §263.403. See “special rule” below.
365	Commence trial or dismiss case deadline.  (Actually the “first Monday” following the one-year anniversary)	The trial court must “commence” the trial on the merits not later than the first Monday after the first anniversary of the date the trial court granted DFPS TMC. § 263.401(a). Final orders appointing the Department as permanent managing conservator without terminating parental rights to make adoption possible are discouraged. § 263.404. <b>Limitation on Permanency Plans:</b> (a) The department’s permanency plan for a child may include as a goal: (1) the reunification of the child with a parent or other individual from whom the child was removed; (2) the termination of parental rights and adoption of the child by a relative or other suitable individual; (3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or (4) another planned, permanent living arrangement for the child. (b) If the goal of the department’s permanency plan for a child is to find another planned, permanent living arrangement for the child, the department shall document that there is a compelling reason why the other permanency goals identified in Subsection (a) are not in the child’s best interest. §263.3026 [eff. 6/19/09]
410	Permanency Progress Report (during extension)	DFPS must file a permanency progress report and serve it on all parties at least 10 days prior to each permanency hearing. §263.303.
420	Permanency Hearing (during extension)	All requirements for initial permanency hearing apply. §263.306.
540	Final Deadline; final “permanency hearing” scheduled	Case <b>must</b> be dismissed 180 days after the first Monday following the first anniversary of the date TMC was granted to DFPS unless: trial on the merits has commenced (263.401); or the child has been placed with a parent for up to 180 days of monitoring (263.403). If a permanency hearing is scheduled on this date, it will be within days, if not hours of the absolute deadline for merits trial or dismissal.
**	Special rule when temporary placement for monitoring breaks down	The court may, in lieu of a final order, continue DFPS as temporary managing conservator for not more than 180 days with the child placed in the home of a parent for monitoring. §263.403(a). The court order must include specific findings of the grounds for the order, and must establish a dismissal date not more than 180 days after the order is <i>rendered</i> . §263.403(b). If DFPS removes the child during the monitoring period, the deadline for dismissal or merits trial is the original dismissal date or 180 days after the removal of the child, whichever is later. § 263.403(c).

Day	Activities Required	Discussion and Comments <sup>3</sup>
	Placement Review Hearings	<p>If the final order appoints DFPS as the managing conservator of the child, without termination of parental rights, the court must continue to review the placement of the child at least every six months until the child is placed for adoption or becomes an adult. §263.501(a).</p> <p><u>If the final order appoints DFPS as the managing conservator of the child, with termination of parental rights, the court must hold a placement review hearing not later than the 90th day after the date the court renders the final order. The court shall conduct additional placement review hearings at least once every six months until the date the child is adopted or the child becomes an adult. §263.501(b).</u></p> <p>Remaining parties are entitled to notice [parents whose rights are terminated are no longer parties]. §263.501(d).</p> <p>The child shall attend each placement review hearing unless the court specifically excuses the child's attendance. <u>A child committed to the Texas Youth Commission may attend a placement review hearing in person, by telephone, or by videoconference.</u> The court shall consult with the child in a developmentally appropriate manner regarding the child's permanency or transition plan, if the child is four years of age or older. Failure by the child to attend a hearing does not affect the validity of an order rendered at the hearing. 263.501(f).</p> <p><u>A court required to conduct placement review hearings for a child for whom the department has been appointed permanent managing conservator may not dismiss a suit affecting the parent-child relationship filed by the department regarding the child while the child is committed to the Texas Youth Commission or released under the supervision of the Texas Youth Commission, unless the child is adopted or permanent managing conservatorship of the child is awarded to an individual other than the department. 263.501(g).</u></p> <p>Placement review reports must be filed 10 days before each hearing. If parental rights have not been terminated, the report must describe the efforts of the department to find a permanent placement for the child, including efforts to: (A) work with the caregiver with whom the child is placed to determine whether that caregiver is willing to become a permanent placement for the child; (B) locate a relative or other suitable individual to serve as permanent managing conservator of the child; and (C) evaluate any change in a parent's circumstances to determine whether: (i) the child can be returned to the parent; or (ii) parental rights should be terminated. §263.502(c) [eff. 6/19/09].</p> <p>The court must review the placement in much the same manner as before the final judgment, and must evaluate the Department's efforts to finalize the permanency plan for the child, such as to obtain an adoptive placement, reunify with a parent or file a new suit for termination. §263.503(a). The court may order services for the parent under certain circumstances. §263.503(b). The court must also continue to review the child's medical care as required by Chapter 266.</p> <p>The court may extend jurisdiction over a foster child beyond age 18 to age 21 with the consent of the youth. §§263.601, et. seq. [eff. 5/23/09]</p>

### Reasonable Efforts Required throughout the Department's Case

The Adoption Assistance and Child Welfare Act (AACWA, Pub L. 96-272), enacted in 1980, originally mandated that states make reasonable efforts to eliminate the need to remove the child from the home and to make reasonable efforts to reunify the child with the family in a timely manner. Title IV-E of the Social Security Act requires that CPS make reasonable efforts to prevent removal of children from their homes, and once removed and placed in foster care to make reasonable efforts to return children to families, or when that is not possible, place them in a safe, stable and permanent home.<sup>4</sup> The Adoption and Safe Families Act of 1997 (ASFA, Pub. L. 105-89) clarified that while reasonable efforts must be made, the child's health and safety are the paramount concern in determining what is reasonable and consistent with the child and family permanency plans.

<sup>4</sup> 42 U.S.C. §§ 671-679b.

At all stages of a CPS case, judges are required to determine whether the Department has made and is making reasonable efforts to achieve permanency. The Texas Family Code requires judges to ensure that the family service plan adequately ensures reasonable efforts are made to enable the child's parents to provide a safe environment for the child, and whether the Department has made efforts to finalize the child's permanency plan in effect. The inquiry is case specific, and requires courts to explore the different efforts to keep families together or to find permanent homes for children who cannot live safely with their parents. Texas Family Code §262.102 requires the court to make a finding that reasonable efforts were made to prevent or eliminate the need to remove the child.<sup>5</sup> Texas Family Code §262.201, which governs the 14-day or Adversary Hearing, requires the court to make a finding that reasonable efforts were made to enable the child to return home, but that a substantial risk of continuing danger exists if the child is returned,<sup>6</sup> and Texas Family Code §263.202, which governs the Status Hearing, requires the court to find whether a plan that has a goal of reunification ensures reasonable efforts are made to enable the child's parents to provide a safe environment for the child.<sup>7</sup> Finally, §263.306, which governs the Permanency Hearings conducted throughout the case, requires that in its review of the service plan, the court determine whether the Department has made reasonable efforts to finalize the permanency plan that is in effect for the child.<sup>8</sup>

Although the Family Code requires that the Department make reasonable efforts with regard to the plan put in place, courts have held that "reasonable efforts" are not required to terminate a parent's rights.<sup>9</sup> Only two termination grounds require the Department to make reasonable efforts before a parent's rights can be terminated: 1) Constructive Abandonment under Texas Family Code §161.001(1)(N), and 2) Inability to Care under §161.003. Otherwise, findings of "reasonable efforts" are important primarily because Federal Financial Participation is affected by the Department's efforts in this regard.

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*In April 2009, the National Council of Juvenile and Family Court Judges issued a Reasonable Efforts Policy Statement making clear that while child welfare agencies reasonable efforts may be constrained by budgetary and economic issues, judicial findings must be based on the services a family truly needs. Even in times of a budget crisis, and in the face of child protection agency officials' arguments that budget restrictions may relieve an agency of making reasonable efforts, the federal law does not provide such an exception. The Council stated that because the inquiry is case specific, and requires the court to vigorously explore efforts made to keep families together to find permanent homes, federal law does not allow exceptions to this requirement regardless of budget constraints.*<sup>10</sup>

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## Funding Streams

Another important aspect of child protection cases involves funding streams. Child protection matters receive funding through a combination of state and federal sources. CAPTA provides three funding streams: Community-based funding, Child Abuse State Grants, and Child Abuse Discretionary Grants. To receive CAPTA money, states must apply to the U.S. Department of Health and Human Services. States are required to demonstrate that they have a comprehensive program for mandatory reporting of suspected child maltreatment; methods for responding to reports and assessing whether there is sufficient evidence to validate the report; and systems for taking action that are appropriate to the level of risk of harm to the child involved.<sup>11</sup>

Title IV-E and IV-B of the Social Security Act establish funding streams for the prevention of child abuse and neglect and for alternative placements when a child cannot safely be returned home.<sup>12</sup> The provisions do not create substantive law; states face financial penalties for failure to comply. Sources of funding include:

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<sup>5</sup> Tex. Fam. Code § 262.102(a) (3).

<sup>6</sup> *Id.* § 262.201(b) (3).

<sup>7</sup> *Id.* § 263.202.

<sup>8</sup> *Id.* § 263.306(b) (1) (E).

<sup>9</sup> *Jones v. Dallas County Child Welfare Unit*, 761 S.W.2d 103, 109 (Tex. App. – Dallas 1988, writ denied).

<sup>10</sup> NCJFCJ Judicial Responsibility Policy Statement, available at [www.ncjfcj.org](http://www.ncjfcj.org).

<sup>11</sup> 42 U.S.C. § 5106(a).

<sup>12</sup> *Id.* §§ 622, 670.

- Foster Care Reimbursement Payments (Title IV-E) are the largest federal expenditure in response to child abuse and neglect. Federal money is matched by state dollars to cover the costs of Foster care maintenance, administration and training.
- Adoption Assistance (Title IV-E) federal funds are matched by state dollars to support adoption related maintenance, administration, and training.
- Promoting Safe and Stable Families Program (Title IV-B, subpart 2) federal funding is dedicated to child abuse and neglect prevention services, including money for court improvement.
- Child Welfare Service Program (Title IV-B, subpart 1) funding is not targeted to a specific use, but available as general federal child abuse and neglect service funds.

## Disproportionality

Disproportionality refers to a deviation in racial or ethnic group representation within the child welfare system relative to census demographics. Racial or ethnic groups may be over or under-represented. The Multi-Ethnic Placement Act (MEPA) was enacted in 1994 to facilitate increased placements of African-American children by excluding limitations of ethnic and racial matching. Thus, child welfare systems could decrease the adoption wait time for children by minimizing racial or ethnic discrimination when matching children with adoptive families.<sup>13</sup> Despite the passage of this federal legislation, while African American children represented 15.1 percent of the U.S. population in 2000, they comprised about 36.6 percent of the child welfare population, thereby being over-represented. There is no statistical difference in the rate child abuse and neglect arises among racial or ethnic groups, though, vast deviations exist concerning the quality and extent of available CPS services.

In January 2006, the Department released the results of a study of disproportionality among children in Texas' foster care system, with findings similar to those shown nationally.<sup>14</sup> The study found, among other things:

- In Texas, even when other factors are taken into account, African-American children spend significantly more time in foster care or other substitute care, are less likely to be reunified with their families, and wait longer for adoption than Anglo or Hispanic children.

As a result, the Department developed a remediation plan and began efforts to eliminate the disproportionate number of African-American children in Texas foster care, including:<sup>15</sup>

- Develop and deliver cultural competency training to service delivery staff.
- Increase targeted recruitment efforts of foster and adoptive families who can meet the needs of children who are waiting for permanent homes.
- Target recruitment efforts to ensure diversity among CPS staff.
- Develop collaborative partnerships with community groups, agencies, faith-based organizations and other community organizations to provide culturally competent services to children and families of every race and ethnicity.

Finally, under Texas law, an advisory committee must promote the adoption of minority children.<sup>16</sup> The committee shall study, develop, and evaluate community programs and projects that involve family support, counseling, parenting education, and child welfare system reform; consult with churches and other cultural

<sup>13</sup> See Multi-Ethnic Placement Act (MEPA), (P.L. 103-382, [subsection] 551-553, 108 Stat. 3518), and Tex. Fam. Code §162.015.

<sup>14</sup> *Disproportionality in CPS: Statewide Reform Effort Begins with Examination of the Problem*, Texas Department of Family and Protection Services, at [http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02\\_Disproportionality.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02_Disproportionality.pdf)

<sup>15</sup> *Disproportionality in CPS – Policy Evaluation and Remediation Plan*, Texas Department of Family and Protective Services, at [http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01\\_Disproportionality.pdf](http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01_Disproportionality.pdf)

<sup>16</sup> Tex. Fam. Code §162.309.

or civic organizations; and report recommendations relating to available services or the adoption of minority children at least annually.

## Additional Resources

*Synthesis of Research on Disproportionality in Child Welfare*, Casey-CSSP Alliance for Racial Equality, at [http://www.cssp.org/uploadFiles/Disproportionality\\_Paper\\_Bob\\_Hill.pdf](http://www.cssp.org/uploadFiles/Disproportionality_Paper_Bob_Hill.pdf)

*Children of Color in the Child Welfare System*, U.S. Children's Bureau, at <http://www.childwelfare.gov/pubs/otherpubs/children/index.cfm>

*African-American Children in Foster Care: Additional HHS Assistance Needed to Reduce the Proportion in Care*, Government Accountability Office, at <http://www.gao.gov/new.items/d07816.pdf>

*Focus on Foster Care*, Casey Family Programs, at [http://casey.org/Resources/Publications/pdf/FocusOnFC\\_BreakthroughSeries.pdf](http://casey.org/Resources/Publications/pdf/FocusOnFC_BreakthroughSeries.pdf)



## How a Case Begins

The Child Abuse Prevention and Treatment Act (CAPTA) requires that every state have a provision for mandatory reporting of suspected child abuse or neglect.<sup>1</sup> The Texas Family Code mandates that any person who has cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report to the appropriate agency.<sup>2</sup> In addition, any professional who is licensed or certified by the state or who works in a licensed facility has a mandatory obligation to report abuse or neglect.<sup>3</sup> This includes teachers, doctors, nurses, daycare employees, juvenile probation and detention officers.<sup>4</sup> Even individuals who are entitled to certain privileged communications, including doctors, lawyers and members of the clergy, have a duty to report, although an attorney who reports abuse may not be required to testify to the details of attorney-client communications that led to the report.<sup>5,6</sup>

Failure to report when required is punishable as a class B misdemeanor.<sup>7</sup>

Although the statute permits reports to be made to law enforcement and certain other agencies,<sup>8</sup> by far the bulk of reports of suspected abuse or neglect are made through the Department's 24-hour toll-free telephone hotline 800-252-5400<sup>9</sup> or online at [www.txabusehotline.org](http://www.txabusehotline.org).

The reporter has the option to identify himself or remain anonymous. But even if a reporter chooses to identify himself, the identity of the reporter is kept confidential and is not subject to the Open Records Act.<sup>10</sup> As long as the reporter is acting in good faith, he is immune from criminal or civil liability.<sup>11</sup> Knowingly making a false report, however, is punishable as a felony and a civil penalty of \$1,000.<sup>12</sup>

In taking the report, the intake worker seeks information from the reporter regarding what happened and background and demographics on the family.<sup>13</sup> Upon request, the parent or other legal representative of the child is entitled to the information obtained at intake and through the investigation, although the name of the reporter remains confidential.<sup>14</sup>

## Initiating an Investigation

Department staff must review every report of child abuse and neglect in order to assure accurate advice, correct referrals, timely and appropriate investigations, and effective interventions. Constitutional privacy protections require that the state avoid unwarranted intrusion into the child and family's lives. The need to protect the child,

1 Child Abuse Prevention and Treatment Act (CAPTA), 1974 (P.L. 93-247).

2 Tex. Fam. Code § 261.101(a).

3 *Id.* § 261.101(b).

4 *Id.* § 261.101(d).

5 *Id.* § 261.202.

6 Unlike lawyers, clergy and other professionals may be required to testify to details of otherwise privileged communications. See *Boardman v. State*, 56 S.W.3d 63 (Tex. App. – Houston [14th Dist.] 2001, pet. ref'd).

7 Tex. Fam. Code § 261.109.

8 *Id.* § 261.103.

9 40 Tex. Admin. Code § 700.504 requires that DFPS operate a system for receipt of reports of child abuse or neglect 24 hours a day, seven days a week.

10 Tex. Fam. Code § 261.101(d); Under certain circumstances, however, a court may order the reporter's identity disclosed. *Id.* § 261.201.

11 *Id.* § 261.106.

12 *Id.* § 261.107.

13 CPS Handbook, Item 2230.

14 Tex. Fam. Code § 261.301(g).

however, remains the chief concern. After intake receives a report, the Department must make a determination of whether a formal investigation should be made. An investigation requires abuse or neglect or the risk of abuse or neglect, as defined by law and agency rule, by a person responsible for the child's care, custody or welfare.<sup>15</sup> To warrant an investigation, the person responsible for the child does not have to directly participate in the abuse or neglect. Instead, failure to protect a child from abuse or neglect is sufficient for an investigation. To the extent the abuse or neglect has already occurred, there must be a threat or likelihood that the abuse will happen again in the foreseeable future.<sup>16</sup>

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### **Section 261.001 Definitions.**

**"Abuse"** includes the following acts or omissions by a person:

- (A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- (B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- (C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;
- (D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;
- (E) sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under Section 21.02, Penal Code, indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code;
- (F) failure to make a reasonable effort to prevent sexual conduct harmful to a child;
- (G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code;
- (H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Section 43.21, Penal Code, or pornographic;
- (I) the current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;
- (J) causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Chapter 481, Health and Safety Code; or
- (K) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Section 43.25, Penal Code.<sup>17</sup>

**"Neglect"** includes:

- (A) the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;
- (B) the following acts or omissions by a person:
  - (i) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

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<sup>15</sup> *Id.* § 261.001(1), (4), (5).

<sup>16</sup> CPS. Handbook, Item 2131.

<sup>17</sup> Tex. Fam. Code § 261.001(1).



- (ii) failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;
- (iii) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused;
- (iv) placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or
- (v) placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under Subdivision (1)(E), (F), (G), (H), or (K) committed against another child; or
- (C) the failure by the person responsible for a child's care, custody, or welfare to permit the child to return to the child's home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away.<sup>18</sup>

**“Person responsible for a child's care, custody, or welfare”** means a person who traditionally is responsible for a child's care, custody, or welfare, including:

- (A) a parent, guardian, managing or possessory conservator, or foster parent of the child;
- (B) a member of the child's family or household as defined by Chapter 71;
- (C) a person with whom the child's parent cohabits;
- (D) school personnel or a volunteer at the child's school; or
- (E) personnel or a volunteer at a public or private child-care facility that provides services for the child or at a public or private residential institution or facility where the child resides.<sup>19</sup>

If a report clearly does not meet the requirements, it is closed without any further action.<sup>20</sup> When a report contains an allegation of past abuse or neglect but there is no future danger, the report will be shared with law enforcement for possible criminal charges.

**Incomplete or questionable information.** Frequently, reporters lack information that the Department needs to determine whether a report meets the statutory definitions of abuse or neglect. For instance, the reporter may not know how a child was harmed, or who caused the harm, or whether the person who caused it is responsible for the child's care, custody, or welfare. Additionally, staff may receive information that appears to be of questionable accuracy, such as a series of apparently fabricated allegations, or allegations made in a recently closed case which are inconsistent with the known circumstances of the family.<sup>21</sup>

Where the Department lacks information or questions its accuracy, the Department procedures generally require attempts to make collateral contacts with other professionals to gather sufficient corroborative information. The Department's procedures allow for collateral contacts with non-professional persons if authorized by a supervisor. Where no collateral contacts are feasible or the contacts do not provide the necessary additional information, the Department accepts or refers a report for investigation and assessment whenever it appears likely that the report meets the statutory definitions of abuse or neglect.<sup>22</sup>

**Assigning the Case a Priority.** Any case that intake does not screen out must be assigned a priority based on the severity and immediacy of the alleged harm to the child.<sup>23</sup> Time frames for a response based on a case's priority begin at the time the intake report is received.

A designation of “priority I” is assigned when a report involves circumstances that pose an immediate risk of abuse or neglect that could result in death or serious harm or when there has been a previous report that was

<sup>18</sup> *Id.* § 261.001(4).

<sup>19</sup> *Id.* § 261.001(5).

<sup>20</sup> CPS Handbook, Item 2141.

<sup>21</sup> *Id.* at Item 2131.

<sup>22</sup> *Id.* at Item 2131.

<sup>23</sup> Tex. Fam. Code § 261.301(d).

closed as unable to complete.<sup>24</sup> If a priority I report involves circumstances in which the death of the child or substantial bodily harm to the child will imminently result unless the Department immediately intervenes, the Department must **immediately respond**.<sup>25</sup> If a priority I report does not involve imminent risk of harm, the Department must respond **within 24 hours**.<sup>26</sup>

The department assigns the designation of “priority II” to all reports of abuse or neglect that are not assigned a “priority I.”<sup>27</sup> If a report is designated priority II, the Department must respond **within 72 hours** by initiating an investigation or by forwarding the report to specialized screening staff.<sup>28</sup> Only priority II cases where all victims are over the age of 6 are eligible for the specialized screening process.<sup>29</sup> Through this process, the screening staff contacts individuals with relevant information and if the child’s safety can be assured without further investigation, the case is closed.<sup>30</sup>

**Anonymous Reports.** If the reporter chooses to remain anonymous, the Department is required to make a preliminary investigation to determine whether there is any evidence to corroborate the report before proceeding with a thorough investigation.<sup>31</sup> The preliminary investigation may include a visit to the child’s home or an interview with and examination of the child and an interview with the child’s parents.<sup>32</sup> Also, the Department may interview any other person the Department believes may have relevant information.<sup>33</sup> Corroborative evidence may include the child’s confirmation of the abuse, observation of physical injuries to the child or family violence in the home, reports from other professionals, such as teachers, doctors or other school officials, or a prior CPS or criminal history showing danger to the child.

Unless the Department determines that there is some evidence to corroborate the report of abuse, the Department may not conduct a thorough investigation or take any action against the person accused of abuse.<sup>34</sup> The worker must stop the investigation as soon as he or she can reasonably determine that the child is safe and the report cannot be corroborated. If the preliminary investigation does not lead to corroborating evidence, the investigator normally informs the parents of that fact.<sup>35</sup>

## The Department’s Conduct in an Investigation

Once a report that meets the statutory definitions of child abuse or neglect by a person responsible for the care, custody, and welfare of the child, the Department assigns the case for an investigation of the allegations and assessment of risk to the child. Investigations are governed by statutory law (Texas Family Code Chapter 261), regulations (40 Texas Administrative Code Chapter 700), and case law. The investigation must be conducted without regard to any pending suit affecting the parent-child relationship.<sup>36</sup> The primary purpose of the investigation must be the protection of the child.<sup>37</sup>

The Department’s investigations are civil in nature. The procedures that the Department uses vary depending on the allegations, the concerns about the allegations, the level of risk in the family, and family history. Mandatory elements of a thorough investigation include an interview and examination of the alleged child victim, interview with at least one of the child’s parents, and an interview with the alleged perpetrator.<sup>38</sup>

Consistent with the child’s protection, the Department’s investigation must determine:

<sup>24</sup> 40 Tex. Admin. Code § 700.505(a)(1); CPS Handbook, Item 2143

<sup>25</sup> *Id.* § 700.505(b)(1).

<sup>26</sup> *Id.* § 700.505(b)(2).

<sup>27</sup> *Id.* § 700.505(a)(2).

<sup>28</sup> *Id.* § 700.505(b)(3).

<sup>29</sup> CPS Handbook, Item 2223.2.

<sup>30</sup> Tex. Fam. Code § 261.3015.

<sup>31</sup> *Id.* § 261.304(a).

<sup>32</sup> *Id.* § 261.304(b).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 261.304(c).

<sup>35</sup> *Id.* § 261.311.

<sup>36</sup> *Id.* § 261.301(a).

<sup>37</sup> *Id.* § 261.301(d).

<sup>38</sup> 40 Tex. Admin. Code § 700.507(b) (3) (B).

- 1) the nature, extent, and cause of the abuse or neglect;
- 2) the identity of the person responsible for the abuse or neglect;
- 3) the names and conditions of the other children in the home;
- 4) an evaluation of the parents or persons responsible for the care of the child;
- 5) the adequacy of the home environment;
- 6) the relationship of the child to the persons responsible for the care, custody, or welfare of the child; and
- 7) all other pertinent data.<sup>39</sup>

The investigation may include a visit to the child's home, unless the allegations can be confirmed or clearly ruled out without a home visit, and an interview and an examination of the child, as well as an interview with the parents and other children in the home.<sup>40</sup> An interview by the Department of the alleged child victim of physical abuse or sexual abuse must be audio taped or videotaped.<sup>41</sup> An "investigating agency" other than the Department may decide not to videotape or audiotape the interview if a determination of "good cause" is made in accordance with agency rules.<sup>42</sup> However, the fact of failure to tape the interview is admissible at trial.<sup>43</sup>

Many communities have developed Child Advocacy Centers for conducting cooperative investigations in a comfortable atmosphere for the child. These facilities may include videotaping and audio taping equipment used in recording interviews of the child. Some also include medical examination and psychological assessment services for use in child abuse and neglect investigations. *See Texas Family Code Chapter 264, Subchapter E, regarding Children's Advocacy Centers.*

**Fourth Amendment Requirements in an Investigation.** With respect to how the Department conducts the investigation, the United States Court of Appeals for the Fifth Circuit set forth guidelines under the Fourth Amendment of the United States Constitution in *Gates v. Texas Department of Protective & Regulatory Services*.<sup>44</sup> For any investigative action that involves entering into or remaining in a home, transporting a child for an interview or removing a child from a parent's custody, the Department must have consent, a court order or exigent circumstances.<sup>45</sup> While *Gates* states that the Fourth Amendment applies, the Court also noted that the government's interest in stopping abuse and removing children from abusive situations is paramount.<sup>46</sup> The Court explained that child abuse and neglect investigations and seizures present a unique dynamic in Fourth Amendment jurisprudence which cannot be ignored.<sup>47</sup> The Court concluded that deciding what is reasonable under the Fourth Amendment will require an assessment of the fact that the courts are dealing with a child who likely resides in the same house as and is under the control of the alleged abuser.<sup>48</sup>

**Entering or remaining in a Home:** The caseworker should first attempt to gain the parent's consent to enter the home. An evaluation of consent is based on the totality of the circumstances and under a standard of objective reasonableness.<sup>49</sup> Silence or passivity cannot form the basis of consent to enter.<sup>50</sup> Also, mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent.<sup>51</sup> Once consent is given, the consent may be limited, qualified, or withdrawn.<sup>52</sup>

<sup>39</sup> Tex. Fam. Code § 261.301(e).

<sup>40</sup> *Id.* § 261.302.

<sup>41</sup> *Id.* § 261.302(e).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Gates v. Tex. Dept. of Protective & Regulatory Services*, 537 F.3d 404 (5th Cir. 2008).

<sup>45</sup> *Id.* at 420.

<sup>46</sup> *Id.* at 429.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 420-21.

<sup>52</sup> *Id.* at 426.

If a caseworker cannot gain consent, they can obtain a court order enter a home.<sup>53</sup> If there is not time to gain a court order, however, the Department can still enter or remain in a home even absent consent if there are exigent circumstances. Under this standard there must be a reasonable cause to believe that the child is in immediate danger.<sup>54</sup> Entering or remaining in the home for the sole purpose of interviewing the child does not suffice.

**Transporting a Child from School to another Location for an Interview:** Before transporting a child for an interview, the Department must first attempt to notify the parent or other person having custody of the child.<sup>55</sup> Absent consent to transport, the Department may obtain a court order. Although there is currently no express statutory provision authorizing such an order, it seems likely that Texas Family Code section 261.303 regarding court orders in aid of an investigation would apply.

**To transport a child from a public school**<sup>56</sup> for an interview absent a court order or consent, a caseworker must have a reasonable belief that the child has been abused and probably will be abused again if he goes home at the end of the school day.<sup>57</sup> **But** an anonymous tip, absent some showing that it is reliable, is not enough to justify removal for an interview.<sup>58</sup> Instead, the tip must be corroborated through a preliminary investigation that can include an interview of the child's teachers or peers or an interview of the child at the school or by looking for injuries on the child without removing any clothing.<sup>59</sup> In determining whether to take the child to another location for the interview, the caseworker should take into account the child's wishes.<sup>60</sup> A person who is notified of and attempts to interfere with the transportation can be charged with a Class B misdemeanor.<sup>61</sup>

**Taking Child into Separate Room for an Interview:** Like a *Terry* Stop, all that is required is a reasonable suspicion of abuse or neglect so long as the interview is no more intrusive than necessary.<sup>62</sup>

**Notice of an Interview with a Child.** When the Department conducts an interview or examination of a child during an investigation, the Department must make a reasonable effort before 24 hours after the time of the interview or examination to notify each parent of the child and the legal guardian of the child, if one has been appointed, of the nature of the allegation and the fact that the interview or examination was conducted.<sup>63</sup> This notice is not required if the Department determines that notice is likely to endanger the safety of the child, the person who made the report or any other person who participates in the report.<sup>64</sup> The notice may also be delayed at the request of a law enforcement agency if notification within the required time would interfere with an ongoing criminal investigation.<sup>65</sup>

**Developing a Safety Plan.** Along with investigating the allegations, within the first 7 days after an investigation is initiated, the caseworker must conduct an initial safety assessment.<sup>66</sup> If the caseworker concludes that the child is safe in the home, the child remains there.<sup>67</sup> If the child would not be safe, however, the caseworker develops a safety plan that involves removal of the perpetrator from the home or the parent identifying and agreeing to another place for the child to live during the investigation.<sup>68</sup>

A safety plan is time-limited. It does not extend beyond the end of the investigation, subject to some exceptions.<sup>69</sup> All tasks in the plan relate directly to the child's immediate safety.<sup>70</sup> A safety plan is a voluntary agreement with a family; it is not legally binding unless ordered by the court. A safety plan must not contradict existing court

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53 Tex. Fam. Code § 261.303(b). The Fifth Circuit held that this procedure satisfies the requirement for a warrant under the Fourth Amendment. 537 F.3d 404, at 420 (see FN 10).

54 537 F.3d 404, at 421.

55 Tex. Fam. Code § 261.302(b-1).

56 537 F.3d 404. The Fifth Circuit in *Gates* did not address the requirements for transporting a child from a private school.

57 *Id.* at 433.

58 *Id.*

59 *Id.*

60 *Id.*

61 Tex. Fam. Code § 261.302(f).

62 *Id.*

63 *Id.* § 261.311(a).

64 *Id.* § 261.311(c).

65 *Id.* § 261.311(d).

66 CPS Handbook, Item 2234.1.

67 *Id.* at Item 2234.26.

68 *Id.*

69 For exceptions, see CPS Handbook, Item 2234.35 Developing a Safety Plan When Transferring to Family-Based Safety Services.

70 See CPS Handbook, Item 2234.31 Controlling Safety Threats for a list of the actions and protective interventions that must be considered for inclusion in a safety plan, possibly in combination with other services.

orders. For example, if one parent has court-ordered visitation with a child, the worker does not ask the other parent to deny visitation during the investigation. The worker can, however, ask a parent to voluntarily forgo or limit his or her own visitation rights for a specified time while the safety of the child is assessed.<sup>71</sup>

The parents or caretakers in the home are asked to sign the safety plan to indicate their willingness and ability to abide by the plan. If only one parent or caretaker is willing to sign, the worker may proceed with the plan, if it appears that the protective parent or caretaker is able to protect the child sufficiently in the immediate future. The safety plan should clearly indicate the consequences the family could face for not following the plan they have signed. The worker may develop as many safety plans with as many persons as needed for the individual circumstances. If there is more than one safety plan, the worker must be aware of the details in all of the plans.<sup>72</sup>

**Voluntary Placements.** A safety plan may include a voluntary placement with a caretaker other than the parent. One long-time issue with voluntary placements was the lack of authority for the volunteer caretaker to make decisions regarding the child placed in their care. In 2009, the 81<sup>st</sup> Texas Legislature passed Senate Bill 1598 to allow parents to authorize specified relatives (grandparent, adult sibling, or adult aunt or uncle)<sup>73</sup> to perform the following acts in regard to the child:

- 1) to authorize medical, dental, psychological, or surgical treatment and immunization of the child, including executing any consents or authorizations for the release of information as required by law relating to the treatment or immunization;
- 2) to obtain and maintain health insurance coverage for the child and automobile insurance coverage for the child, if appropriate;
- 3) to enroll the child in a day-care program or preschool or in a public or private primary or secondary school;
- 4) to authorize the child to participate in age-appropriate extracurricular, civic, social, or recreational activities, including athletic activities;
- 5) to authorize the child to obtain a learner's permit, driver's license, or state-issued identification card;
- 6) to authorize employment of the child; and,
- 7) to apply for and receive public benefits on behalf of the child.<sup>74</sup>

Texas Family Code §34.003 lays out the required contents of any authorization agreement. An authorization agreement must be signed and sworn to before a notary public by the parent and the relative.<sup>75</sup> A parent may not execute an authorization agreement without written order of the appropriate court if:

- 1) there is a court order or pending suit affecting the parent-child relationship concerning the child;
- 2) there is pending litigation in any court concerning:
  - a. custody, possession, or placement of the child;
  - b. access and visitation with the child; or
- 3) the court has continuing, exclusive jurisdiction over the child.<sup>76</sup>

<sup>71</sup> *Id.* at Item 2234.33.

<sup>72</sup> *Id.*

<sup>73</sup> Tex. Fam. Code §34.001.

<sup>74</sup> *Id.* § 34.002.

<sup>75</sup> *Id.* § 34.004.

<sup>76</sup> *Id.*

If both parents did not sign the authorization agreement, the parties shall mail a copy of the executed authorization agreement to the parent who was not a party to the authorization agreement at the parent's last known address not later than the 10th day after the date the authorization agreement is executed, if that parent is living and that parent's parental rights have not been terminated.<sup>77</sup> An authorization is voidable by a party if the other party knowingly obtained the authorization agreement by fraud, duress, or misrepresentation, or made a false statement on the authorization agreement.<sup>78</sup> An authorization agreement does not confer or affect standing or a right of intervention in any proceeding under Title 5 of the Texas Family Code.<sup>79</sup> An authorization agreement terminates if, after execution of the agreement:

- 1) a court enters a later order regarding custody, possession, and placement of and access to or visitation with a child or regarding the appointment of a guardian for the child pursuant to the Texas Probate Code, unless the court gives written permission; or
- 2) upon written revocation by a party, if the party follows the prongs set forth in the applicable section of the Texas Family Code.<sup>80</sup>

The Department shall prescribe forms relating to authorization agreements not later than January 1, 2010 and shall make these forms available to the public.

*Informational Manuals* Recent legislation amended Texas Family Code §261.3071 to require the Department to provide informational manuals to voluntary caregivers, who are defined as a person who voluntarily agrees to provide temporary care for a child who:

- A. is the subject of an investigation by the department or whose parent, managing conservator, possessory conservator, guardian, caretaker, or custodian is receiving family-based safety services from the department;
- B. is not in the conservatorship of the department; and
- C. is placed in the care of the person by the parent or other person having legal custody of the child.

The informational manual must be in English and Spanish and must include information regarding the role of a voluntary caregiver, including information on how to obtain any documentation necessary to provide for a child's needs.<sup>81</sup>

**Removing a Child from a Parent's Custody.** If the child is not safe in the home and the caseworker cannot develop an agreed upon plan to ensure the child's safety, the caseworker removes the child from the parent's custody. To do so, however, the caseworker must first have a court order for removal or exigent circumstances. "Exigent circumstances" means that based on the totality of the circumstances, there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if he remains in his home.<sup>82</sup> Factors to consider include: 1) time available to obtain a court order; 2) the nature of the abuse (its severity, duration & frequency); 3) the strength of the evidence supporting the allegations of abuse; 4) the risk that the parent will flee with the child; 5) the possibility of less extreme solutions to the problem; and, 6) the harm to the child that might result from the removal.<sup>83</sup>

For a detailed discussion of removal, refer to Chapter 3 of this manual.

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<sup>77</sup> *Id.* § 34.005.

<sup>78</sup> *Id.* § 34.006

<sup>79</sup> *Id.* § 34.007(c).

<sup>80</sup> *Id.* § 34.008.

<sup>81</sup> *Id.* §261.3071(g).

<sup>82</sup> 537 F.3d. 404, at 429.

<sup>83</sup> *Id.*



## The Court's Involvement in an Investigation

**Orders in Aid of an Investigation:** As discussed above, if a caseworker cannot get consent for an investigative action and there are no exigent circumstances, they can obtain a court order to aid in the investigation. The Texas Family Code authorizes such orders to enter a home, school, or any place where the child might be located for the purposes of an interview, examination, and investigation, or to obtain a physical, psychological or psychiatric examination of the child or medical records relating to the child.<sup>84</sup>

The standard for such an order is “good cause shown.”<sup>85</sup> This phrase, however, is not defined in either the Texas Family Law Code or case law. Consequently, it is unclear exactly what it means. Looking to the law on criminal search warrants, it seems likely that good cause means probable cause to believe that the search will uncover evidence of child abuse or neglect. This does not require a showing that the abuse actually happened but only that there is a “substantial chance” or “fair probability” of abuse or neglect.<sup>86</sup> A better-than-even chance is not required.<sup>87</sup> Although there are no standards for how the Department must “show” good cause, like a criminal search warrant, it seems reasonable that the Department submit a written affidavit executed under penalty of perjury with the facts establishing probable cause. For criminal search warrants, to the extent the facts are based on an informant rather than on the caseworker’s personal knowledge or observations, the court looks to the totality of the circumstances in determining the informant’s reliability.<sup>88</sup>

Although the Department does not keep statistics, anecdotally, prior to *Gates*, the Department rarely sought an order to aid in an investigation. After *Gates*, however, it is likely that the Department will be seeking them more often.

To further facilitate the Department’s investigation, the court may also prohibit removal of the child from the state during an investigation.<sup>89</sup>

The Family Code also provides that the court may order a parent or caretaker to submit to medical or mental examination and provide access to related records.<sup>90</sup> However, because this provision was enacted prior to HIPAA, it is unclear if use of this provision would be successful. An indigent parent is entitled to appointed counsel in a hearing relating to the examination or release of medical records under this section.

**Orders for Removal of a Child.** If the caseworker wants the child to live outside of the parent’s home, even temporarily, and the parent does not agree, the caseworker must obtain a court order. If, as discussed above, exigent circumstances exist, then the caseworker can remove the child and then seek the court order.<sup>91</sup> If there are no exigent circumstances, the caseworker has to seek a court order before removing the child.<sup>92</sup>

**Refusal to Comply with Court Orders.** Refusal to submit to orders in aid of investigation may be grounds for termination of parental rights in a subsequently filed suit affecting the parent child relationship (SAPCR).<sup>93</sup> If a person fails to report to an authorized agency within a reasonable time after receiving proper notice of an investigation, that person is deemed to have refused to cooperate with the investigation.<sup>94</sup>

A person commits an offense if, with the intent to interfere with the department’s investigation, the person relocates the person’s residence, either temporarily or permanently, without notifying the department of the address, or conceals the child and the person’s concealment interferes with the investigation.<sup>95</sup> The offense is a

<sup>84</sup> Tex. Fam. Code § 261.303.

<sup>85</sup> *Id.*

<sup>86</sup> *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Tex. Fam. Code § 261.306.

<sup>90</sup> *Id.* § 261.305.

<sup>91</sup> *Id.* §§ 262.104 and 262.105.

<sup>92</sup> *Id.* § 262.101.

<sup>93</sup> *Id.* § 161.001(1) (I).

<sup>94</sup> *Id.* § 261.3031(b).

<sup>95</sup> *Id.* § 261.3032.

Class B misdemeanor, and if the conduct constitutes an offense under another law, the actor may be prosecuted under this section or the other law.<sup>96</sup>

**Family Code Title 4 Protective Orders.** A parent or other caretaker may also initiate legal action that protects the child and obviates the need for the Department to step in. A parent may seek to remove the alleged perpetrator of abuse by obtaining a temporary restraining order or by resort to protective order procedures.<sup>97</sup> The potential for direct enforcement of the protective order by law enforcement agencies makes it a better option than injunctive relief in most cases.<sup>98</sup>

The Department is specifically authorized to file an application for protective order.<sup>99</sup> If the Department recommends, and court finds that the child requires protection from family violence, a protective order must be rendered.<sup>100</sup> The court shall render a protective order if evidence at the adversary hearing shows that the child requires protection from family violence.<sup>101</sup>

**Temporary Ex Parte Protective Order.** A temporary ex parte protective order (TEPPO) can be used to direct a respondent to do or refrain from doing certain acts.<sup>102</sup> Additionally, the order can exclude a perpetrator from a residence under certain situations.<sup>103</sup> A TEPPO can be issued without notice or hearing, but the court has the option to recess the hearing on the TEPPO to contact the respondent by phone and provide the respondent with an opportunity to be present for the hearing.<sup>104</sup> If the court chooses to recess court to allow the respondent an opportunity to be present, the hearing must resume that same day without regard to the respondent's availability.<sup>105</sup> The order is effective for up to 20 days. On an applicant's request or on the Court's own order, the 20 day period may be extended for additional 20 day periods.<sup>106</sup> A TEPPO can be enforced through a civil contempt proceeding, and certain provisions can be criminally enforced.<sup>107</sup> During the time a TEPPO is in existence, a valid TEPPO supersedes any other order under Title 5 (SAPCR), to the extent there is a conflict.

**Temporary Restraining Order to Remove the Perpetrator from the Home.** The Department, without asking for removal of the child, may file a petition for removal of the alleged perpetrator of child abuse from the household; the court may order removal of the alleged perpetrator and also order the remaining parent to report violations. The order is good for up to 14 days.

An order to remove the perpetrator from the home is only a civil temporary restraining order (TRO) designed to protect and preserve property. Although criminal penalties are provided if either the alleged perpetrator or the remaining parent violates the order, the criminal penalties can only be enforced through a finding of contempt.<sup>108</sup> A PO and TEPPO, however, are designed to protect people and provide greater level of protection than TRO and are directly criminally enforceable. Thus, in most cases they are preferred over a restraining order.

## Completion of an Investigation

An investigation should be completed (finished casework, documentation in the Department's database and supervisor approval) within 60 days.<sup>109</sup> A case that begins as a thorough investigation may be closed after an abbreviated investigation if: (1) the child is safe; (2) abuse or neglect did not occur; (3) there is no uncontrolled risk at the end of the investigation; and (4) the worker has enough information to refer the family to any needed

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<sup>96</sup> *Id.* § 261.3032(b), (c).

<sup>97</sup> *Id.* § 71.001 et seq.

<sup>98</sup> *Id.* § 86.001 et seq.

<sup>99</sup> *Id.* § 82.002(d) (2).

<sup>100</sup> *Id.* § 262.102(c).

<sup>101</sup> *Id.* § 262.201(c).

<sup>102</sup> *Id.* § 83.001(d).

<sup>103</sup> *Id.* § 83.006.

<sup>104</sup> *Id.* § 83.007.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* § 83.002.

<sup>107</sup> *Id.* §§ 85.021, 85.022; Tex. Pen. Code § 25.07(a).

<sup>108</sup> Tex. Fam. Code § 262.1015.

<sup>109</sup> CPS Handbook, Item 2223 et seq.



services.<sup>110</sup> But before an abbreviated investigation is deemed complete, the caseworker must, at a minimum: (1) with certain exceptions, check the abuse and neglect backgrounds of every member of the family and home; (2) interview and examine each alleged victim; (3) interview at least one parent in the home, and if the parent is the alleged perpetrator, interview at least one other person who is not an alleged victim or perpetrator; (4) visit the home unless abuse and neglect can be ruled out without taking this action; and (5) check the criminal background of each alleged perpetrator, unless an alleged perpetrator is a child who is also alleged to be a victim.<sup>111</sup>

A completed investigation requires an allegation disposition, an overall disposition, a definition of overall roles and a risk assessment.

**Allegation Dispositions.** After the investigation, the Department is required to determine by a preponderance of the evidence whether each allegation made in the case is:

- 1) reason to believe (RTB) (abuse or neglect has occurred);
- 2) ruled-out (abuse or neglect has not occurred);
- 3) moved (before staff could draw a conclusion, the persons involved in the allegation moved and could not be located); or
- 4) unable-to-determine (none of the above dispositions is appropriate).<sup>112</sup>

In addition, the records may show an “administrative closure” disposition where a preliminary investigation shows the matter should not be pursued.<sup>113</sup> “Administrative closure” is allowed only in certain limited circumstances after a “preliminary” investigation.<sup>114</sup>

**Overall Dispositions.** A case must also be given an “overall disposition” based upon the disposition of each allegation. The overall investigation disposition is the summary finding about the abuse or neglect that was investigated.<sup>115</sup> The overall disposition is derived from the individual allegation dispositions as follows:

- 1) if any allegation disposition is RTB, the overall case disposition is RTB;
- 2) if all allegations are ruled out, the overall case disposition is ruled out;
- 3) if any disposition is unable to complete and no disposition is RTB, or unable to determine, the overall disposition is unable to complete;
- 4) if any allegation disposition is unable to determine and no allegation disposition is RTB, the overall case disposition is unable to determine.

A case is not eligible for administrative closure — i.e. closure without a “disposition” — if any one allegation meets the criteria for allegation dispositions as specified in (1)–(4) above (under “Allegation Dispositions”).<sup>116</sup>

**Risk Assessment.** Regardless of the allegation and overall dispositions, the only cases that are opened for services are those where, based on a risk assessment, there is a reasonable likelihood that children in the family will be abused or neglected in the foreseeable future.<sup>117</sup> For a detailed description of the risk assessment process refer to Item 2235 of the CPS Handbook.

<sup>110</sup> *Id.* Note: all four elements listed in the handbook need to be established for an investigator to recommend closure of the case after an abbreviated investigation; it is not enough that the child is safe if the alleged abuse is found to have occurred or if there is deemed to be risk of future abuse.

<sup>111</sup> CPS Handbook, Item 2224.2.

<sup>112</sup> 40 Tex. Admin. Code § 700.511(a); CPS Handbook Item 2271.

<sup>113</sup> 40 Tex. Admin. Code § 700.511(a) (5).

<sup>114</sup> 40 Tex. Admin. Code § 700.507.

<sup>115</sup> 40 Tex. Admin. Code § 700.511(b); CPS Handbook, Item 2271.1.

<sup>116</sup> 40 Tex. Admin. Code § 700.511(b); CPS Handbook, Item 2271.1.

<sup>117</sup> CPS Handbook, Item 2235.

## Notice of Investigative Findings

**Notification in Abbreviated and Thorough Investigations.** Subject to certain exceptions, the following persons must be notified of the results of an abbreviated or thorough investigation: (1) each alleged victim who was interviewed; (2) each custodial parent of each alleged victim; (3) each non-custodial parent of each alleged victim; (4) each legal guardian, if one appointed, of each alleged victim; (5) each person identified as an alleged perpetrator; and (6) the person who reported the alleged abuse/neglect, if the identity of the reporter is known. This notice must be provided no later than 15 days after the investigation is closed by the supervisor.<sup>118</sup>

**Notification in Administratively Closed Investigations.** Subject to certain exceptions, the Department must notify the following parties about the findings of an investigation that was closed administratively: (1) each custodial parent of each alleged victim; (2) each non-custodial parent of each alleged victim; (3) each legal guardian, if one has been reported, of each alleged victim; and (4) the person who reported the alleged abuse or neglect, if his identity is known.<sup>119</sup> The Department must provide notice to the parents and guardian no later than 24 hours after the investigation is closed by the supervisor or to the reporter within 15 days.<sup>120</sup>

**Optional provision of investigation findings upon request.** With regard to any type of investigation, the Department may provide information about the investigation to the custodial and non-custodial parents and legal guardian of any child in the home under investigation, at the parent's or guardian's request, unless one of the exceptions exists. Staff may provide information from the investigation to the extent deemed necessary by the Department for the protection and care of the child when such information is necessary to meet the child's needs. However, staff may not release information that is subject to redaction under 40 Texas Admin. Code § 700.204.<sup>121</sup>

Texas Admin. Code § 700.204 provides:

- 1) Unless otherwise permitted by law, prior to the release of confidential investigation or case records, the Texas Department of Protective and Regulatory Services (TDPRS) shall redact the records to remove the name, address, and any other information in the record which tends to reveal the identity of any individual as a reporter. In the event that an individual who was a reporter also provided a witness statement or other evidence during the course of the investigation, that individual's identity as a witness, as well as the information provided by that individual in the role of witness, will be released, provided that any information which might identify that individual as the reporter is redacted from the record prior to its release.
- 2) The Department shall withhold the release of any records obtained from another source, if the release of that record to this requestor is specifically prohibited under state or federal law. Information which may be withheld under this section includes, but is not limited to, the following:
  - A. all medical records subject to the Medical Practices Act, Texas Civil Statutes, Article 4495b, unless their release to the requestor is authorized under §5.08 of that Act;
  - B. HIV information unless release to the requestor is authorized under the Health and Safety Code, Chapter 81;
  - C. criminal history or arrest records obtained from a law enforcement entity unless their release to the requestor is specifically authorized under state and federal law;
  - D. adult or juvenile probation records, as well as juvenile arrest records, unless their release to the requestor is specifically authorized under state and federal law; and

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<sup>118</sup> 40 Tex. Admin. Code § 700.513(a); CPS Handbook Item 2273.11.

<sup>119</sup> 40 Tex. Admin. Code § 700.513(b); CPS Handbook Item 2273.12.

<sup>120</sup> CPS Handbook, Item 2273.12.

<sup>121</sup> *Id.* at Item 2273.13.

- E. polygraph exam reports, unless their release to the requestor is specifically authorized under the Polygraph Examiners Act, Texas Civil Statutes, Article 4413(29cc), §19A.
- 3) Notwithstanding any other provision in this chapter, TDPRS may withhold any information in its records if, in the judgment of TDPRS, the release of that information would endanger the life or safety of any individual. TDPRS shall keep a record of any information so withheld and shall document the specific factual basis for its belief that the release of the information would be likely to endanger the life or safety of an individual.
  - 4) Information withheld from a requestor under this subsection, as well as the documented basis for withholding information under subsection (c) of this section, may be released only upon a court order pursuant to the provisions in §261.201(b) of the Code.

**Exceptions to Providing Notification.** Notwithstanding the above required notice, the Department is not required to give notice where:

- **Unable to locate.** During the investigation, the Department was unable to locate the person entitled to notification despite having made reasonable efforts to locate the person.
- **Safety exception.** Notwithstanding requirements or permission to notify certain persons of investigation results, the Department shall not provide the notice when the Department determines that the notice is likely to endanger the safety of any child in the home, the reporter or any other person who participated in the investigation of the report. This safety exception does not apply to a designated perpetrator or designated victim perpetrator entitled to receive notice, or to a former alleged perpetrator entitled to receive notice.
- **Law enforcement exception.** The Department may delay notification of a person entitled to notification under this section if a law enforcement agency requests the delay because timely notification would interfere with an ongoing criminal investigation. The Department may delay notification only in those circumstances in which the law enforcement agency agrees to notify the Department at the earliest time that the delay is no longer needed. The Department must provide the notification within 15 days after the date on which the Department is notified that the law enforcement agency has withdrawn the request to delay the notification.
- **Administrative closure exception.** The Department must not provide required notifications or optional information about findings to parents and guardian if a CPS investigation is being closed administratively because the report was referred for investigation to another authorized entity, such as law enforcement or another state agency.<sup>122</sup>

**Form of Notification.** The notice of the results of the investigation may be written or oral, with certain exceptions. Each person identified as a designated perpetrator or designated victim/perpetrator must be given written notice of the investigation findings. In the case of a victim/perpetrator child, notice is provided to the child's parents.<sup>123</sup> Notification to an alleged perpetrator against whom all allegations have been "ruled out" must be in writing.<sup>124</sup>

The worker must also send each person against whom the allegations were "ruled out" a separate written "Notification of Right to Request Removal of Role Information."<sup>125</sup> This notice must be given within 15 days

<sup>122</sup> CPS Handbook, Item 2273.14.

<sup>123</sup> 40 Tex. Admin. Code § 700.513(f).

<sup>124</sup> 40 Tex. Admin. Code § 700.513(g).

<sup>125</sup> CPS Handbook, Item 2273.5.

following conclusion of the investigation or other final ruling which resulted in a finding of “ruled out” or its equivalent.<sup>126</sup>

Per the Texas Family Code, at the conclusion of an investigation in which the department determines that the person alleged to have abused or neglected a child did not commit abuse or neglect, the department shall notify the person of the person's right to request the department to remove information about the person's alleged role in the abuse or neglect report from the department's records.<sup>127</sup> On request, the department must remove information from the department's records concerning the person's alleged role in the abuse or neglect report.<sup>128</sup>

The right to request removal of role information may also arise when an administrative review, an appeal of the administrative review, or a court hearing results in a finding of “ruled out” or its legal equivalent.<sup>129</sup>

The “removal or role” process must be completed within 90 days from receipt of a “properly submitted” request. While the removal process is ongoing, CPS may not release any information in its report which pertains to the alleged perpetrator whose role has been “ruled out”. To be “properly submitted” the request must be: (1) submitted on the prescribed form; (2) signed by the alleged perpetrator; (3) mailed or delivered to CPS within 45 days after the mailing date of the notification letter; and (4) mailed to an address specified on the prescribed form. If the request is not properly submitted, it will be denied. Notice of denial must be sent within 30 days of receipt of the request for removal of role information.<sup>130</sup>

## Remedies for an Improper Investigation

**Administrative Review of Investigative Findings.** Those who disagree with the Department's determination that there was reason to believe that abuse or neglect occurred may seek administrative review through an “Administrative Review of Investigation Findings” (ARIF).<sup>131</sup> If an individual is entitled to an administrative hearing before the State Office of Administrative Hearings (SOAH), the Department may, at its sole discretion, waive the conduct of an ARIF and proceed directly to the SOAH hearing.<sup>132</sup>

**A Lawsuit for a Violation of Rights under State or Federal Law.** If a parent feels the Department's investigation violated their state, federal or constitutional rights, they can bring a lawsuit against the Department and the individual caseworker. If, however, a caseworker's actions meet certain criteria, the parent cannot get money from the caseworker even if a court later finds that the caseworker made the wrong decision about an investigation or removal. State law refers to this protection as official immunity, while federal law calls it qualified immunity.

Under official immunity, caseworkers are protected under Texas law if they acted in good faith.<sup>133</sup> The test for good faith is whether a reasonably prudent caseworker, under the same or similar circumstances, could have believed they needed to act in the same way.<sup>134</sup> It is an objective test and is not based on the caseworker's actual intent. But to meet the standard, the caseworker does not have to prove that all reasonably prudent caseworkers would have acted the same but, rather, that at least one reasonably prudent caseworker would have done so.<sup>135</sup>

For any claims under federal law, a caseworker is entitled to qualified immunity unless all of the following are true<sup>136</sup>:

<sup>126</sup> CPS Handbook, Item 2274.

<sup>127</sup> Tex. Fam. Code § 261.315(a).

<sup>128</sup> *Id.* § 261.315(b).

<sup>129</sup> CPS Handbook, Item 2274.

<sup>130</sup> *Id.* at Item 2274.

<sup>131</sup> Tex. Fam. Code § 261.309; 40 Tex. Admin. Code § 700.516.

<sup>132</sup> 40 Tex. Admin. Code § 700.516(j).

<sup>133</sup> The caseworker must also be acting within the scope of their authority. Tex. Hum. Res. Code § 40.061. Texas law requires DFPS to investigate reports of child abuse or neglect. Tex. Fam. Code § 261.301. The investigation may include visits to the child's home and interviews with the child, parents and other children in the home. Tex. Fam. Code § 261.302. Texas law also allows a caseworker to remove a child even without a court order. Tex. Fam. Code § 262.104. As a result, caseworkers' actions in investigating a child abuse report, including visits to the home or interviewing the child, or removing a child from a parent's custody fall within the scope of their authority. There is also a specific immunity from civil liability for caseworkers who take a child into custody without a court order if there is reasonable cause to believe there is an immediate danger to the physical health or safety of the child. Tex. Fam. Code § 262.003.

<sup>134</sup> See *City of Lancaster v. Chambers*, 883 S.W.2d 652, 656 (Tex. 1994).

<sup>135</sup> *Id.*

<sup>136</sup> *Hare v. City of Cornith*, 330 F.3d 320, 325 (5th Cir. 1998). Under a recent United States Supreme Court case, a court does not have to address the elements in any particular order (e.g., it can determine whether there was a clearly established law before determining whether a constitutional violation occurred). *Pearson v. Callahan*, No. 07-751 (2009).

- 1) Taken in the light most favorable to the parent, the alleged facts show that the caseworker's conduct violated statutory or constitutional law;
- 2) The law was clearly established at the time of the caseworker's actions; and
- 3) The caseworker's conduct was objectively unreasonable in light of the established law.

The objectively unreasonable test is similar to the good faith test under Texas law. It is not based on what the caseworker actually believed but on whether a reasonably competent caseworker could have believed that there was a need for the action.<sup>137</sup>

## Separation of Investigative and Service Functions

The Department must separate the performance of investigations by Department staff from the delivery of services to clients and their families to the extent possible.<sup>138</sup> The program administrator must develop procedures facilitating the exchange of information between employees responsible for performing investigations and those responsible for the delivery of services to clients and families. The program administrator may consider the needs and caseloads in the different areas of the region in separating these functions. Therefore, CPS staff conducting investigations may provide services that are needed to ensure the safety of children during the investigation and may refer families for other services as needed during the investigation.

## Opening a Case for Services

If the risk assessment indicates that there is a reasonable likelihood that there will be abuse or neglect in the foreseeable future, the case can be:<sup>139</sup>

- 1) Opened for services;
- 2) Closed without services but with the child living in the home and a referral to community resources; or
- 3) Closed without services with the child living with a caregiver designated by the parent who either has or agrees to obtain managing conservatorship over the child.<sup>140</sup>

A case can be opened for either family based safety services or court ordered services.

**Family Based Safety Services (FBSS).** A case is eligible for FBSS if the child can remain in the home while the family receives services or if the parents have agreed to the child living with a designated caregiver while receiving services. There is no court supervision of families in FBSS and neither parents nor children are entitled to attorneys.

Within 45 days after the FBSS unit accepts the case, the safety plan should be replaced with a "Family Service Plan" specifying tasks and services for the case while in FBSS status.<sup>141</sup> The worker must attempt to work with the parents to develop the family service plan. After completing the plan, the worker must ask the parents to sign it, and give them a copy of it. If either parent will not sign the plan, the worker must document on the plan the reasons why a parent will not sign and must give the parent a copy of the plan.<sup>142</sup>

*Note that the signature of the parent is **not** required, under the Department's rule, for the family service plan to be implemented, but that an "attempt to work with" the parent must be documented.*

<sup>137</sup> *Evelt v. Denttff*, 330 F.3d 681, 687 (5th Cir. 2003).

<sup>138</sup> Tex. Hum. Res. Code § 40.0525.

<sup>139</sup> CPS Handbook, Item 2235.

<sup>140</sup> CPS Handbook, Item 2234.45.

<sup>141</sup> 40 Tex. Admin. Code § 700.704(a).

<sup>142</sup> *Id.*

The purposes of the Family Service Plan are to:

- 1) establish a structured, time-limited process for providing services; and
- 2) ensure that services progress as quickly as possible towards enabling the family to:
  - (A) reduce the risk of abuse or neglect; and
  - (B) function effectively without CPS assistance.<sup>143</sup>

The Family Service Plan is required to:

- 1) include the reasons CPS is involved with the family;
- 2) include an assessment, developed with the family, of family problems and strengths and resources that can be utilized to help the family reduce the risk of child abuse and neglect;
- 3) identify the goals or changes needed to reduce the level of risk;
- 4) specify the tasks the family must complete during the effective period of the plan in order to make the needed changes;
- 5) describe the services CPS must provide to help the family complete those tasks;
- 6) indicate how CPS will evaluate the family's progress in completing each task and individual goal;
- 7) indicate the period of time and frequency of the tasks and services; and
- 8) meet federal and state laws, including the DFPS Licensing Minimum Standards as outlined in the CPS Handbook, Section 6400, Case Planning.<sup>144</sup>

The Department's policy requires that the caseworker develop the service plan after discussing with the family: (1) the reasons for CPS involvement; (2) the primary issues that have placed the child at risk; (3) the specific goals and changes needed to reduce the level of risk; and (4) the strengths and resources the family can apply to make those changes. In addition, the plan when drafted must: (1) identify the tasks that the family must work on during the time frame indicated on the plan, (2) describe the services that CPS must provide to help the family complete those tasks within the time frame indicated, and (3) indicate how CPS will evaluate the family's progress in completing each task and individual goal. Finally, all Family Service Plans are required to be time-limited. That is, there should be deadlines placed both on the tasks to be completed by the parents and the services to be provided by the Department.<sup>145</sup>

**Court Ordered Services without Removal.** If a family refuses or fails to comply with FBSS but the child has not been involuntarily removed from the parent's care, the Department may file a legal suit affecting the parent-child relationship (SAPCR), to compel cooperation as injunctive relief.<sup>146</sup> A person who fails to follow the court orders issued pursuant to the SAPCR is subject to appropriate sanctions in order to protect the health and safety of the child, including the removal of the child as specified by Chapter 262 of the Texas Family Code.<sup>147</sup>

In SAPCRs where the child has not been removed, the Family Code does not require the court to appoint an attorney *ad litem* or a guardian *ad litem* for the child or an attorney for the parent because the Department is not seeking termination of parental rights or to be named as conservator of a child.<sup>148</sup> Nevertheless, a trial court

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<sup>143</sup> 40 Tex. Admin. Code § 700.704(b).

<sup>144</sup> 40 Tex. Admin. Code § 700.704(c).

<sup>145</sup> CPS Handbook, Item 3143.

<sup>146</sup> Tex. Fam. Code § 264.203(b).

<sup>147</sup> *Id.* § 264.203(c).

<sup>148</sup> See *Id.* §§ 107.011, 107.012, 107.0125 and 107.013.

*may* appoint an attorney or guardian *ad litem* for a child in such cases if the appointment is necessary and in the best interest of the child.<sup>149</sup>

Thus, a common practice is to appoint an attorney for the child even if the Department's pleadings might not technically require the appointment at the beginning of the case. The Texas Family Code also does not require that a SAPCR where the child has not been removed to come to a legal resolution within 12 months.<sup>150</sup>

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<sup>149</sup> *Id.* § 107.021(a).

<sup>150</sup> *Id.* § 263.401.







Two chapters of the Texas Family Code provide detailed guidance for lawsuits filed by the Texas Department of Family and Protective Services in which it requests conservatorship of children. Chapter 262 governs how courts respond to the Department's requests for children's removal from parents due to child abuse or neglect; chapter 263 provides for judicial review of the legal cases to ensure children are not lost in the child protection system.

## Procedures in Suit by Governmental Entity to Protect Health and Safety of Child

Chapter 262 provides three options to the Department for removal of a child from its home:

- 1) emergency removal prior to obtaining a court order;
- 2) removal after obtaining an *ex parte* order; or
- 3) removal after notice and hearing.

### Introduction

Chapter 262 authorizes police, juvenile probation officers, and the Department's caseworkers to take possession of a child in an emergency. This may be done either with prior written court approval or without such an order if the situation warrants immediate state intervention to rescue a child from dangerous circumstances. Actual practice and procedures in counties around Texas vary considerably, but all should comply with the basic framework set out in the statutes discussed here. Many of the statutory requirements governing child protection cases stem from federal mandates imposed by CAPTA and ASFA, as noted previously.<sup>1</sup>

### Authority of the Department

Suits under this chapter most often are prompted by an immediate need for removal. However, in some cases there is a real and unacceptable risk of harm to the child even in the absence of an obvious emergency. The Department may proceed under Chapter 262 even if no immediate emergency can be shown by providing the "adversary hearing" to the parents before removing the child.<sup>2</sup>

### Requesting Conservatorship in Emergency Situations

Depending upon the circumstances, the Department may file a suit affecting the parent-child relationship (SAPCR) requesting an order granting permission to take possession of the child or take possession of the child without obtaining a court order.<sup>3</sup> The court may also make an initial order for protection of the child with or without affording the parents prior notice or an adversarial hearing.<sup>4</sup> In a suit brought under Chapter 262, the court may award temporary managing conservatorship to the Department *ex parte*.<sup>5</sup> The health and safety of the

<sup>1</sup> Sampson & Tindall's Texas Family Code Annotated, Chapter 262 Introductory Comment.

<sup>2</sup> Tex. Fam. Code § 262.113; § 262.205

<sup>3</sup> *Id.* § 262.001(a)

<sup>4</sup> *Id.* § 262.101; § 262.102

<sup>5</sup> *Id.* § 105.001(h).

child is the paramount concern in determining whether sufficient “reasonable efforts” have been made to prevent or eliminate the need to remove a child from home.<sup>6</sup>

### The Department's Pleadings

The original pleading filed in a termination case will usually be entitled, “Original Petition In A Suit Affecting the Parent-Child Relationship; Termination Petition And/Or Managing Conservatorship” or it may be a “Petition for Protection of a Child, Conservatorship, and For Termination in a Suit Affecting the Parent-Child Relationship (SAPCR).” The petition will include the information required by Chapter 105 for every SAPCR, such as each child's name, age and residence, the name and other information about the mother, which is usually known, and whatever information the department has about possible fathers, whether presumed, alleged, adjudicated or acknowledged, or will state that the father is unknown. The Petition will usually seek termination of the parent child relationship if the problems leading to the suit cannot be resolved, and in the alternative it will seek as a final disposition the appointment of CPS or an appropriate protective adult as the managing conservator of the child.

There are numerous grounds on which the parent-child relationship can be terminated.<sup>7</sup> *Please see Chapter 4 for more information regarding these grounds.*

Except in aggravated circumstances, DFPS should seek termination of parental rights only after exploring other options to ensure the health and safety of the child. Therefore, in most cases DFPS requests termination of the parent-child relationship *conditionally* in the original petition — if, and only if, reunification cannot be effected. Conditional pleadings reduce the need for amended pleadings — and the attendant need to re-serve all parties — and are consistent with the mandated statutory warnings to the parents that their parental rights may be restricted or terminated unless they are willing and able to provide the child with a safe environment.<sup>8</sup>

Since an amended petition entirely supplants the original petition, each party who has been served with the original petition and defaulted (but not had a judgment entered against him) must be served with the amended petition and given another opportunity to answer. An interlocutory default judgment may be entered against a party served with the original petition prior to the filing of an amended petition, obviating the need for further service of process on that party. If, however, the original petition requested only managing conservatorship, a father served with that petition could not be “defaulted” on an amended petition requesting termination of his parental rights without new service of process.

### Filing the Petition in Emergency and Non-Emergency Circumstances

Depending upon the circumstances, the Department may remove before or after obtaining a court order, and the court may make an initial order for protection of the child with or without affording the parents an opportunity for an adversarial hearing before removing the child. In a suit brought under Chapter 262, the court may award temporary managing conservatorship to the Department *ex parte*.<sup>9</sup>

The Department may pursue one of three different routes to remove a child and request that conservatorship be transferred to the Department or another suitable person. In essence, these three routes are:

- A. emergency removal → suit filed → *ex parte* emergency orders obtained → adversary hearing;
- B. suit filed → *ex parte* emergency orders obtained → child removed → adversary hearing;
- C. suit filed (“possession with intent to return,” chronic neglect or chronic low-level abuse) → adversary hearing → child removed.

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<sup>6</sup> *Id.* § 262.001(a); 42 U.S.C. § 671(a)

<sup>7</sup> *Id.* § 161.001

<sup>8</sup> *Id.* § 262.201(c)(2); § 263.006

<sup>9</sup> *Id.* § 105.001(h).

### Possession of Child in an Emergency without a Court Order

Under appropriate circumstances, a department caseworker (as well as any law enforcement or juvenile probation officer) has the authority to take possession of a child without a court order.<sup>10</sup> If the removal is effected prior to court order, the Department must file a suit affecting the parent-child relationship immediately, request the court to appoint an attorney *ad litem* and guardian *ad litem* for the child, and request an initial hearing to be held no later than the first working day after the date the child is taken into possession.<sup>11</sup>

If the child has been removed without a court order, the Original Petition *must* be filed *no later than the close of business of the next business day after the removal* and an *ex parte* order *must* be signed during that same time period.<sup>12</sup> If the court is unavailable for a hearing on the first working day, then the hearing shall be held on the first working day after the court becomes available. Note that the *only* reason allowed for delay is court unavailability — absence of Department lawyers or staff is not an excuse. *In no event may the court hearing be delayed beyond the third working day after the child is taken into possession.*<sup>13</sup> The statute presumes that a court will always be available within three days. If the *ex parte* hearing is not held within the required time, the child must be returned.<sup>14</sup>

Sometimes the child should not remain in the household until an adversary hearing is held, but there is time to obtain judicial approval before removing the child. In those situations, DFPS will seek an *ex parte* order authorizing removal.<sup>15</sup> Before signing an *ex parte* order, the court must find that:

- 1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare;
- 2) there is no time, consistent with the physical health or safety of the child and the nature of the emergency, for a full adversary hearing under Subchapter C; and
- 3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.<sup>16</sup>

If DFPS does not need to take possession before the adversary hearing, the petition may be filed under Texas Family Code § 262.113, and the hearing held under Texas Family Code § 262.205.

Even if emergency removal is not requested, DFPS must support its suit with an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence and caution that:

- 1) reasonable efforts have been made to prevent or eliminate the need to remove the child from the child's home; and
- 2) allowing the child to remain in the home would be contrary to the child's welfare.<sup>17</sup>

The court, at the adversary hearing, must make findings on these points.<sup>18</sup> These allegations and findings are necessary for federal foster care funding.<sup>19</sup>

**Temporary possession of child without a court order with intent to return the child:** There are situations in which a law enforcement officer takes possession of a child when during a criminal investigation the officer discovers a child is missing or situations in which an authorized representative (DFPS or law enforcement

<sup>10</sup> *Id.* § 262.104

<sup>11</sup> *Id.* § 262.105.

<sup>12</sup> *Id.* § 262.106

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* §§ 262.101; 262.102; 262.106

<sup>16</sup> *Id.* § 262.102

<sup>17</sup> *Id.* § 262.113

<sup>18</sup> *Id.* § 262.205

<sup>19</sup> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which ... provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. 42 U.S.C. § 671(a)(15).

officer) takes possession of a child in danger.<sup>20</sup> In these situations, if the child is taken into the possession of the Department either directly or through law enforcement with the sole intent to return the child to a parent, custodian or caretaker entitled to possession of the child, DFPS has **five days** to locate the caretaker and return the child.<sup>21</sup> If the child cannot be returned to the caretaker within five days, the Department must file suit and schedule hearings as if the child had been involuntarily removed according to Texas Family Code § 262.104 at the end of the five-day period. An adversary hearing must be held **within 14 days** after the end of the five-day period.<sup>22</sup>

### Ex Parte Order Authorizing Removal

Before a court can issue an *ex parte* temporary order authorizing the removal of a child without first holding a hearing on the matter, the court must find that the supporting affidavit states facts sufficient to satisfy a person of ordinary prudence and caution that:

- 1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare;
- 2) there is no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
- 3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.<sup>23</sup>

Once a court issues an order authorizing the removal of a child, the state and the parties must work the case with an eye toward the 12 months to permanency timeframe mandated by Chapter 263 of the Texas Family Code.

In 2008, the Supreme Court of Texas denied the Department's petition for review by mandamus in the case involving the removal of children from a religious group ranch. After the Department took possession of the children and filed suits requesting orders to remove the children from their parents, a trial court issued temporary orders that continued the Department's custody. The Third Court of Appeals held that the Department failed to meet its burden under *Texas Family Code* § 262.201(b)(1) and directed the trial court to vacate its temporary orders.<sup>24</sup> The Department sought mandamus relief, which the Supreme Court denied. The Supreme Court, with three justices dissenting in part, held that the removal of the children was not warranted. Although the Department claimed that the appellate court's decision left the Department unable to protect the children, the Texas Family Code gave a trial court broad authority to protect children short of separating them from their parents and placing them in foster care, including options under Texas Family Code §§ 105.001(a)(4), 262.1015, and 261.303(b)-(c). The trial court had to vacate the orders as directed, but the trial court did not have to do so without granting other appropriate relief to protect the children.<sup>25</sup>

### Child Placement Resources Form

If the Department determines that removal of the child is warranted, a "child placement resources form" must be prepared. The proposed child placement resources form:

- A. instructs the parent or other person having legal custody of the child to:
  - (i) complete and return the form to the department or agency; and
  - (ii) identify in the form three individuals who could be relative caregivers or designated caregivers, as those terms are defined by Section 264.751; and,

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<sup>20</sup> Tex. Fam. Code § 262.007(c); § 262.110(b)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 262.201(g).

<sup>23</sup> *Id.* §§ 262.101, 262.102

<sup>24</sup> *In re Steed*, No. 03-08-00235-CV (Tex.App. – Austin 2008, orig. proceeding) (mem. op.)

<sup>25</sup> *In re Texas Department of Family and Protective Services*, 255 S.W.3d 613, No. 08-0391 (Tex. 2008, orig. proceeding).

- B. informs the parent or other person of a location that is available to the parent or other person to submit the information in the form 24 hours a day either in person or by facsimile machine or e-mail.<sup>26</sup>

The child placement resources form must include information regarding the time by which DFPS must complete a background check on any proposed caregiver.<sup>27</sup> This statute envisions that the required information will be provided cooperatively and before the 14 day hearing. The court must inform the parties that refusing to provide the form will not result in the delay of the case.<sup>28</sup> The Department must, prior to the adversary hearing, prepare background checks, including CPS and criminal history searches, on any person designated as a possible caregiver on the form, except relatives located in other states.<sup>29</sup> In a departure from past practices of the Department, the statute specifically permits the Department to place children with a relative or other designated individual identified on the proposed child placement resources form if DFPS determines that the placement is in the best interest of the child before conducting the background and criminal history check or a home study.<sup>30</sup>

Section 262.114, Family Code, was amended in 2009 by adding Subsections (a-1) and (a-2) to read as follows:

- (a-1) At the full adversary hearing under Section 262.201, the department shall, after redacting any social security numbers, file with the court:
  - (1) a copy of each proposed child placement resources form completed by the parent or other person having legal custody of the child;
  - (2) a copy of any completed home study performed under Subsection (a); and
  - (3) the name of the relative or other designated caregiver, if any, with whom the child has been placed.
- (a-2) If the child has not been placed with a relative or other designated caregiver by the time of the full adversary hearing under Section 262.201, the department shall file with the court a statement that explains:
  - (1) the reasons why the department has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and
  - (2) the actions the department is taking, if any, to place the child with a relative or other designated caregiver.<sup>31</sup>

**» PRACTICE TIP :** It is critical that the issues of placing siblings together and placing children with relatives whenever safe and feasible are addressed as soon as possible. The Department must make prompt and reasonable efforts to keep siblings together and to find and assess relatives for placement. Placing the child in familiar surroundings with familiar people can help minimize the trauma of removal, facilitate contact with extended family members, promote stability, and minimize changes in placement.

<sup>26</sup> Tex. Fam. Code § 261.307(a)(2)

<sup>27</sup> *Id.* § 261.307(b)

<sup>28</sup> *Id.* § 262.201(c)

<sup>29</sup> *Id.* § 262.114(a)

<sup>30</sup> *Id.* § 262.114(b).

<sup>31</sup> Added by 81st Leg. Reg. Sess. 2009, S.B. No. 2385, effective September 1, 2009.

## Who Must Be Served

The Petitioner (the State) must ensure that notice of the lawsuit is provided to those who are sued. The right to notice is a federal due process right, and must be distinguished from the right to service of citation at the initiation of a suit, which is a creature of state statutes and rules. For example, notice by first class mail may be sufficient for purposes of federal due process, and is used in some states. Texas state law requires service of citation on necessary parties to the suit. Those entitled to service include each parent, alleged father, or man registered with the Paternity Registry.<sup>32</sup>

Alleged fathers are merely that — they are alleged, and there may be several alleged fathers in one case. Alleged fathers are not parents as defined in Section 101.024 of the Texas Family Code, and do not have the right to a court appointed attorney, but alleged fathers have the right to service of citation unless that right is waived in an affidavit of waiver of interest in the child, or forfeited by failing to register with the paternity registry.<sup>33</sup>

**» PRACTICE TIP : Early determination of paternity issues may be important as it affects potential relative placement decisions. On the other hand, because paternity conveys rights to custody, reunification, and visitation, the court should not be too quick to rule on an alleged father's paternity status before sufficient information has been gathered and considered.**

## Citation by Publication and Diligent Search

When the whereabouts of one or both parents of a child are unknown, the agency must make a diligent effort to locate each missing person.<sup>34</sup> Once DFPS has made the effort and has been unsuccessful, DFPS can file a Motion for Citation by Publication under Texas Rule of Civil Procedure 109.

Rule 109 requires that before citation by publication can be issued by the clerk, the petitioner must file an affidavit of “due diligence”.<sup>35</sup> That rule also requires the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of, in these cases, the known but un-locatable parent, before granting any judgment on such service.

## Methods of Providing Notice of Hearing

The requirements for citation should not be confused with the requirements for notice of motions or of particular hearings. Citation generally must be by personal service on the respondent unless citation is waived by the respondent, forfeited under the “paternity registry” process, or by some form of substituted service, including citation by publication, authorized by the Rules of Civil Procedure is used. Once citation is complete and a return of service is on file, notice may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopy number, or by such other manner as the court in its discretion may direct.<sup>36</sup> Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day.<sup>37</sup> Notice may also be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.<sup>38</sup>

<sup>32</sup> For further discussion of the paternity registry, see Chapter 11 of this Manual.

<sup>33</sup> Tex. Fam. Code § 102.009(a)(8); see *Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>34</sup> Tex. Fam. Code §161.107.

<sup>35</sup> Tex. R. Civ. P. 109.

<sup>36</sup> Tex. R. Civ. P. 21(a)

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



## Chapter 262 Hearing — The Adversary Hearing

The adversary hearing must be held within 14 days of **removal**.<sup>39</sup> Note that this is not from the date that the petition is filed but rather when the child is removed, including the date of removal if the child was removed prior to the Department seeking an *ex parte* order. During this hearing the judge will determine whether the child returns home, is placed with a relative, or remains in substitute care such as a foster home or other substitute care facility while the case is pending.

The Temporary Order issued at this hearing will likely set the status quo for the case.

### Burden of Proof at Adversary Hearing

At the “full adversary” or 14-day hearing in a case after the lawsuit has been filed, a Texas court uses a standard of “sufficient evidence to satisfy a person of ordinary prudence and caution” to determine whether a child should remain in foster care.<sup>40</sup> A preponderance of the evidence standard is used in final trials seeking a legal resolution to the case, except that clear and convincing evidence is required for termination of parental rights. It is noteworthy that neither standard is used for the temporary orders hearing. Instead, the evidence must be sufficient to satisfy a person of ordinary prudence and caution that the orders are needed for the protection of the child.

Pursuant to Texas Family Code § 262.201(b), the statutory presumption is that the child should be returned to the home. The court should look to the current situation in the home in determining the issue of continuing danger to the child and may consider whether a person in the household has previously caused serious injury or death or has sexually abused another child.<sup>41</sup>

The Family Code requires a court to return a child to a parent at the conclusion of this hearing unless the court finds evidence sufficient to satisfy a person of ordinary prudence and caution that:

- 1) there was a danger to the physical health or safety of the child which was caused by an act or a failure to act of the person entitled to possession and for the child to remain the home is contrary to the welfare of the child;
- 2) the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child’s removal; and
- 3) reasonable efforts have been made to enable the child to return home, but there is substantial risk of a continuing danger if the child is returned home.<sup>42</sup>

These three elements including findings of reasonable efforts to avoid removal and to enable the child to return are required for foster care funding under federal law; however, violation of reasonable efforts alone will not result in a child being returned. Although there is a presumption in favor of parents, in reality, the presumption is almost always overcome by a standard of evidence that is akin to a probable cause standard. Also, keep in mind that the court has already approved the placement of the child in foster care based on the Department’s affidavit, and the evidence presented at the adversary hearing rarely contradicts the prior allegations sufficiently to override the court’s earlier decision. The protection of the child is always the overriding concern of the judge. As with all proceedings under Chapter 262, “the child’s health and safety is the paramount concern” of the trial judge.<sup>43</sup>

If the court determines that the child should not be returned, the court must enter an order regarding the care and custody of the child, terms of contact with the child and his or her parents and services to be provided to the family. If the child is placed in a temporary managing conservatorship with the Department, it must file a written

<sup>39</sup> Tex. Fam. Code § 262.201(a)

<sup>40</sup> *Id.* § 262.201

<sup>41</sup> *Id.* § 262.102(d)

<sup>42</sup> Tex. Fam. Code § 262.201(b)(1)-(3)

<sup>43</sup> Tex. Fam. Code § 262.001(b)

Service Plan within 45 days of the date on which the Department became the temporary managing conservator.<sup>44</sup> This date is typically the date of the emergency or ex-parte hearing and order.<sup>45</sup>

The court may also order that 1) each parent submit a proposed child placement resources form pursuant to Section 261.307, if not previously provided; 2) DFPS has all rights and duties of a conservator as set forth in Texas Family Code Chapter 153; 3) the parties undertake certain tasks such as a psychological or psychiatric evaluation, drug or alcohol assessment and rehabilitation services, or random urinalysis, 4) visitation occur under very strict supervision, 5) the parents pay child support, or 6) the parents stay away from the child's placement or school. The court should warn parents that their parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the child with a safe environment.<sup>46</sup>

If neither parent can be located and citation by publication is needed, the court may render temporary orders without waiting for the citation by publication to be completed.<sup>47</sup>

**» PRACTICE TIP :** If the child was living with only one parent at the time of removal, and the noncustodial parent was not involved in the alleged abuse or neglect and expresses interest in placement, counsel should investigate whether such placement would be in the child's best interests. If the child has had limited contact with the noncustodial parent in the past, and/or the noncustodial parent lives in another state, a home study or ICPC request generally should be conducted before placement.

### Aggravated Circumstances — Fast Track to Permanency

Reasonable efforts are not always required.<sup>48</sup> If the court finds that there are aggravating circumstances, the court may waive the requirement that the Department must make reasonable efforts to return the child and develop a Service Plan for the parent, and may accelerate the trial schedule for a final order.

Texas Family Code Section 262.2015(c) requires the court to set the initial permanency hearing within 30 days of the finding that reasonable efforts to make it possible for the child to safely return home are not required. The court shall set the suit for trial on the merits to facilitate final placement of the child.

Under Texas Family Code § 262.2015(b), the court may find that the child has been subjected to aggravated circumstances if the parent has engaged in conduct against the child in violation of the Texas Penal Code, including:

Section 19.02	Murder
Section 19.03	Capital Murder
Section 19.04	Manslaughter
Section 21.11	Indecency with a child
Section 22.011	Sexual Assault
Section 22.02	Aggravated Assault
Section 22.04	Injury to a child
Section 22.041	Abandoning or endangering a child
Section 25.02	Prohibited sexual conduct

<sup>44</sup> Tex. Fam. Code § 263.101

<sup>45</sup> Tex. Fam. Code §§ 262.102 or 262.106

<sup>46</sup> *Id.* § 262.201(c)

<sup>47</sup> Tex. Fam. Code § 262.201(f)

<sup>48</sup> *Id.* § 262.2015(a)



Section 43.25 Sexual performance by a child

Section 43.26 Possession or promotion of child pornography

If the child is the victim of serious bodily injury or sexual abuse inflicted by the parent, it would also likely be covered by the laundry list above as well, but the statute sets it out as independent grounds. It is also important to note that aggravated circumstances may be established if the acts were done by another person, but with the parent's consent.

Pursuant to Texas Family Code §262.2015(b), “abandonment” may also constitute aggravated circumstances where a child is abandoned without identification or a means to identify the child.<sup>49</sup> Also, abandonment may constitute aggravated circumstances where the parent places the child with another (not the parent) for at least six months, without expressing an intent to return and without providing adequate support for the child.<sup>50</sup>

The previous involuntary termination of parental rights of other children may constitute aggravated circumstances if the prior termination of parental rights was based on knowingly placing the child in circumstances or knowingly engaging in conduct that created a physical or emotional danger to the child, commonly known as D & E grounds under Family Code §161.001.<sup>51</sup>

The felony assault of the child or another child that results in serious bodily injury is also considered an aggravated circumstance.<sup>52</sup>

**» PRACTICE TIP :** “Aggravated circumstances” must be separately established for each parent involved in the case; if only one parent is shown to have engaged, or at least cooperated in the prohibited conduct, “reasonable efforts” are still required for the other parent. Since the first permanency hearing on an “aggravated circumstances” case must be held within 30 days after the finding, an “aggravated circumstances” finding will bypass the normal status hearing and place the non-offending parent and the department on a fast track for reunification efforts that may or may not be appropriate in the particular case.

## Chapter 263 Review Hearings

Chapter 263 provides for judicial review of the circumstances of children under the care of the Department. Texas follows a one-year deadline — or 12 months to permanency — law, in an attempt to accelerate placement of children and to prevent them from languishing in the state's foster care system.<sup>53</sup>

### Permanency

Achieving permanency for a child who is the subject of child protection litigation involves finding a safe, stable place where the child may grow up, with caretakers who have the legal responsibility for ensuring the child's care. Lengthy stays in temporary foster care have been shown to create new problems for the child. A foster child lacks the security of knowing where and with whom the child will live, and for how long before another disruption. Absence of stability and permanency may impede the child's emotional and educational development. In making decisions about the child's custodial environment, “[d]elay and indecision are rarely in a child's best

<sup>49</sup> Tex. Fam. Code § 262.2015(b)(1)

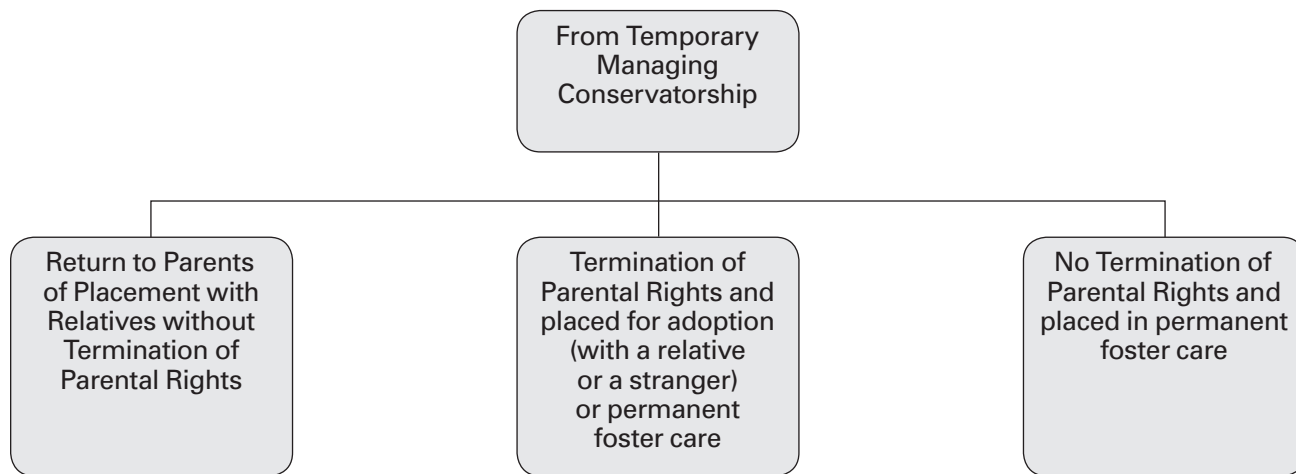
<sup>50</sup> Tex. Fam. Code § 262.2015(b)(4)

<sup>51</sup> *Id.* § 262.2015(b)(5)

<sup>52</sup> *Id.* § 262.2015(b)(6)

<sup>53</sup> Taken in part from the Sampson & Tindall's Texas Family Code Annotated, Chapter 263 Review of Placement of Children, Introductory Comment.

interests.”<sup>54</sup> Both DFPS and the courts play significant roles in securing permanency for a child in foster care. The Texas Family Code establishes a statutory hearing schedule that must be strictly enforced to ensure the child and family achieve permanency and stability as quickly as possible.<sup>55</sup>



### Status Hearing

After the court issues a temporary order, including an *ex parte* order, appointing DFPS as temporary managing conservator of the child, the court must hold a status hearing within 60 days of the temporary order being rendered.<sup>56</sup> Generally, the Status Hearing focuses on matters related to the Service Plan. However, the child's status, including placement and other issues, will be reviewed by the court as well.

The department is specifically required to once again report on the existence and contents of any child placement resources form.

#### Sec. 263.003. Information Relating to Placement of Child

(a) Except as provided by Subsection (b), not later than the 10th day before the date set for a hearing under this chapter, the department shall file with the court any document described by Sections 262.114(a-1) and (a-2) that has not been filed with the court.

(b) The department is not required to file the documents required by Subsection (a) if the child is in an adoptive placement or another placement that is intended to be permanent.<sup>57</sup>

The Status Hearing is an opportunity for the judge and other parties to review the service plan; it rarely serves as an opportunity to re-litigate whether the children should have been placed in the State's care or not.<sup>58</sup>

**Procedure of Status Hearing:** If all parties entitled to citation and notice under Chapter 263 were not served, the court shall make findings as to whether:

- 1) the Department has exercised due diligence to locate all necessary persons; and

<sup>54</sup> *Comment*, American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases B-5 (1996).

<sup>55</sup> The Texas Supreme Court has recently reinforced the importance of complying with the statutory deadlines. See *In re DFPS*, \_\_\_\_\_ S.W. 3d \_\_\_\_\_, No. 08-0524 (Tex. 2009) (deadlines are not jurisdictional, but order granting new trial after termination order was signed revived the original deadline and trial court should have dismissed the suit on proper motion when "drop dead" date passed without a new final order).

<sup>56</sup> Tex. Fam. Code § 263.201(a)

<sup>57</sup> Added by 81st Leg. Reg. Sess. 2009, S.B. No. 2385, effective September 1, 2009.

<sup>58</sup> *Id.* § 263.202(b)

- 2) each custodial parent, alleged father, or relative of the child before the court has furnished the department all available information necessary to locate another absent parent, alleged father, or relative of the child through the exercise of due diligence.<sup>59</sup>

The remainder of the Status Hearing is limited to matters related to the contents and execution of the service plan filed with the court.<sup>60</sup> The court will review the service plan that the department filed for reasonableness, accuracy, and compliance with requirements of court orders and make findings as to whether:

- 1) a plan that has the goal of returning the child to the child's parents adequately ensures that reasonable efforts are made to enable the child's parents to provide a safe environment for the child; and
- 2) the child's parents have reviewed and understand the service plan and have been advised that unless the parents are willing and able to provide the child with a safe environment, even with the assistance of a service plan, within the reasonable period of time specified in the plan, the parents' parental and custodial duties and rights may be subject to restriction or to termination or the child may not be returned to the parents.<sup>61</sup>

### Warning to Parents

At the Status Hearing and each subsequent Permanency Hearing, the court must inform each parent in open court that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents demonstrates a willingness and ability to provide the child with a safe environment.<sup>62</sup>

### Service Plans

The most important issue dealt with at the Status Hearing involves the Family Plan of Service. Not later than the 45th day after the date the court renders a temporary order appointing the department as temporary managing conservator of a child under Chapter 262, the Department must file a service plan.<sup>63</sup>

The Department shall consult with relevant professionals to determine the skills or knowledge that the parents of a child **under two years of age** should learn or acquire to provide a safe placement for the child. The department shall incorporate those skills and abilities into the department's service plans, as appropriate.<sup>64</sup>

To the extent that funding is available, the service plan for a child under two years of age may require therapeutic visits between the child and the child's parents supervised by a licensed psychologist or another relevant professional to promote family reunification and to educate the parents about issues relating to the removal of the child.<sup>65</sup>

### Contents of the Service Plan

The service plan must:

- 1) be specific;
- 2) be in writing in a language that the parents understand, or made otherwise available;
- 3) be prepared by the Department or other agency in conference with the child's parents;
- 4) state appropriate deadlines;
- 5) state whether the goal of the plan is:

<sup>59</sup> *Id.* § 263.202

<sup>60</sup> *Id.* § 263.202(b)

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 263.006

<sup>63</sup> *Id.* § 263.101; *see also Id.* §§ 263.102-103 (regarding service plan contents, signing & taking effect).

<sup>64</sup> *Id.* §§ 263.102(f).

<sup>65</sup> *Id.* §§ 263.102(g)

- a. return of the child to the parent(s);
  - b. termination of parental rights and placement of the child for adoption; or
  - c. because of the child's special needs or exceptional circumstances, continuation of the child's care out of the child's home;
- 6) state the steps necessary to:
- a. return the child to the child's home if the child is placed in foster care;
  - b. enable the child to remain in the child's home with the assistance of a service plan if placement is in the home under the Department's supervision; or
  - c. otherwise provide a permanent safe placement for the child;
- 7) state the actions that the child's parents must take to achieve the plan goal during the period of the service plan and the assistance to be provided to the parents by the Department toward meeting that goal;
- 8) state any specific skills or knowledge that the child's parents must acquire or learn, as well as any behavioral changes the parents must exhibit to achieve the plan goal;
- 9) state the actions and responsibilities that are necessary for the child's parents to take to ensure that the child attends school and maintains or improves the child's academic compliance;
- 10) state the name of the person the child's parents may contact for information relating to the child if other than the person preparing the plan. The service plan must prescribe any other term or condition that the Department determines to be necessary to the service plan's success; and
- 11) prescribe any other term or condition that the department or other agency determines to be necessary to the service plan's success.<sup>66</sup>

The service plan must be filed with the court and the court will review the plan at the next required hearing after the plan is filed.<sup>67</sup> The court may render appropriate orders to implement, or require compliance with, an original or amended service plan.<sup>68</sup>

The service plan takes effect when the child's parents and the appropriate representative of the Department sign the plan. The plan becomes effective when signed or, if the parents refuse to sign, when filed with the court by the Department, and does not have to be formally approved by the court to become effective. The plan is in effect until amended by the court or superseded by a new plan negotiated between the parents and the Department.<sup>69</sup> It should be noted that although a service plan may be in effect, it is not a court order. The court is responsible for rendering appropriate orders to require such compliance as is necessary for the parents to successfully achieve the plan's goals, thus it is not unusual for a court's order to track the service plan.

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<sup>66</sup> *Id.* § 263.102(a)

<sup>67</sup> *Id.* § 263.105

<sup>68</sup> *Id.* § 263.106

<sup>69</sup> *Id.* § 263.103 (d)

**» PRACTICE TIP :** Counsel for the child and parents should have substantial input as to what services are appropriate to help the family reunify and ensure the child’s well-being. Counsel should challenge ‘boilerplate’ service plans that do not take into account the individualized needs and circumstances of the family and the reasons the child was removed. Counsel should consider whether the parents and/or child need specific services, e.g., specialized health or mental health care; domestic violence services; drug or alcohol treatment; daycare or after school care; tutoring or other educational services; assistance in finding appropriate employment or housing, etc.

Counsel should keep in mind that failing to comply with a court order that establishes the actions necessary to obtain return of the child may be a ground for termination of parental rights under Family Code Section 161.001(1) (O). If the requirements of the service plan are not appropriate, and do not advance the cause of reunification, they should not be included in the court order. On the other hand, incorporating appropriate goals and tasks into the order, including requirements for specific services to be provided to the parent, may provide a clear road map to reunification and make it more likely that the parent will succeed. All participants need to exercise care in developing service plans that are appropriate to the particular needs of the case and orders that are clear, concise and specific.

## Permanency Hearings

### Initial Permanency Hearing

An initial permanency hearing must be held not later than the 180th day after the date the court renders a temporary order appointing the Department as temporary managing conservator of a child, which is calculated from the date the *ex parte* order is rendered.<sup>70</sup> The court shall hold a permanency hearing to review the status of and permanency plan for the child to ensure that a final order consistent with that permanency plan is rendered before the date for dismissal of the suit under this chapter.

The Court will inquire about how much progress has been made in a case. Usually 60 days, when the Status Hearing is held, is not enough time to evaluate where a case is headed. However, at six months into the case, the parties should have a good indication whether reunification is still a viable goal. Reunification at this point will depend significantly on how much progress a parent is making on their service plan and the related orders. A judge may authorize mediation at this setting.

The child should attend the hearing and each subsequent permanency hearing unless the child is “specifically” excused by the judge, including a child who is in the conservatorship of DFPS but committed to the Texas Youth Commission or released under supervision of the Texas Youth Commission.<sup>71</sup> Pursuant to Texas Family Code §263.301(a), in addition to the child, those who are entitled to notice to be present and to be heard at the permanency hearings are:

- the Department
- foster parents
- pre-adoptive parents
- a relative providing care

<sup>70</sup> *Id.* § 263.304.

<sup>71</sup> *Id.* § 263.302. Since 2007, the court has been required to “consult with the child in a developmentally appropriate manner regarding the child’s permanency plan, if the child is four years of age or older and if the court determines it is in the best interest of the child.” Effective May 23, 2009, a child committed to the Texas Youth Commission may attend a permanency hearing in person, by telephone, or by videoconference. Added by 81st Leg. Reg. Sess. 2009, H.B. No. 1629, effective May 23, 2009.

- the director of the group home or institution where the child resides
- each parent
- the managing conservator or guardian
- the attorney *ad litem*
- a court appointed volunteer advocate
- any person named by the court with an interest in the child

The way courts conduct permanency hearings vary across Texas and courts employ different methods of including this wide range of individuals who are entitled to be heard in the permanency hearing. For example, in many courts these hearings resemble more of a controlled discussion than a hearing where witnesses are sworn and subject to direct and cross-examination.

### Permanency Progress Reports

Under Texas Family Code §263.303, the Department has a duty to file with the court and provide to each party, the child's attorney *ad litem*, the child's guardian *ad litem* and the child's volunteer advocate, a permanency progress report at least 10 days prior to the date set for each permanency hearing. The Permanency Progress Report shall include:

- the name of any person entitled to notice who has not been served,
- a description of efforts to locate and request service of citation of unserved parties;
- a description of each parents' assistance in providing information necessary to locate an unserved party;
- a recommendation that the suit be dismissed or continue;
- an evaluation of the parties' compliance with temporary orders and with the Service Plan;
- an evaluation of whether the child's placement in substitute care meets the child's needs and if not recommended, other plans or services to meet the child's needs or circumstances;
- a description of the permanency plan for the child and recommended actions necessary to ensure that a final order consistent with that permanency plan, *including the concurrent permanency goals contained in that plan*, is rendered before the date for dismissal of the suit under this chapter;
- with respect to a child 16 years of age or older, services needed to assist the child in transition to adult life;<sup>72</sup> and,
- a summary of the child's medical care since the last hearing.<sup>73</sup>

Parents whose rights are being affected, the parent's attorney, and the attorney *ad litem* or guardian *ad litem* for the child may all file a response to the progress report.<sup>74</sup> If so, the response must be filed at least three days before the hearing.<sup>75</sup> It should be noted that the list of those entitled to file a response is not as expansive as those entitled to notice, to be present and to be heard.

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<sup>72</sup> *Id.* § 263.303.

<sup>73</sup> *Id.* § 266.007.

<sup>74</sup> *Id.* § 263.303(c)

<sup>75</sup> *Id.*

## Permanency Plan

The Department must prepare a permanency plan in any case where the Department has been appointed temporary managing conservator. In 2009, the 81st Texas Legislature amended Texas Family Code §263.3025 to require the Department to include concurrent permanency goals consisting of a primary permanency goal and at least one alternate permanency goal.<sup>76</sup> Additionally, the 81st Texas Legislature enacted new Family Code §263.3026, which provides a laundry list of possible permanency plans for a child. As the statute makes clear, placing a child in the permanent managing conservatorship of the Department should be the last alternative considered:

- (a) The Department's permanency plan for a child may include as a goal:
  - (1) the reunification of the child with a parent or other individual from whom the child was removed;
  - (2) the termination of parental rights and adoption of the child by a relative or other suitable individual;
  - (3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or
  - (4) another planned, permanent living arrangement for the child.
- (b) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement for the child, the department shall document that there is a compelling reason why the other permanency goals identified in Subsection (a) are not in the child's best interest.<sup>77</sup>

A copy of that plan must be given to those entitled to notice not later than the tenth day before the hearing.<sup>78</sup> At the initial permanency hearing, the court must review the status of the child, review the permanency plan for the child, and may set the case for a final hearing.<sup>79</sup> The court is charged with having a view towards the end of the case and should ensure that the plan will be executed to allow the timely entry of a final order in accordance with the plan's goals.<sup>80</sup>

## What is APPLA?

Although ASFA has been in effect for some length of time, one of the Act's terms of art — "APPLA" — has not been commonly used in Texas. "APPLA" is the acronym for **Another Planned Permanent Living Arrangement**, which is defined as a permanent legal arrangement for a child designed to promote stability and permanency in a child's life.<sup>81</sup> In fact, this term of art entered the Texas Family Code as part of new §263.3026 in 2009 and it refers to permanent placements other than a reunification with a parent, adoption, or permanent managing conservatorship to a relative. The "planned" component contemplates that all other permanency options have been considered but are not feasible for a child. With the inclusion of the word "permanent," APPLA is supposed to replace the historically used goals of long-term foster care and independent living/emancipation as those goals often lead to frequent moves for the child.

## Determinations Made at Permanency Hearing

The procedure for the Permanency Hearing is set out at Texas Family Code §263.306. During the Permanency Hearing, the court will broadly address several main issues:

- Issues relating to the parties;

<sup>76</sup> Senate Bill 939, Section 4, 81st Texas Legislature, 2009.

<sup>77</sup> *Id.*, Section 5.

<sup>78</sup> Tex. Fam. Code. § 263.3025

<sup>79</sup> *Id.* § 263.304

<sup>80</sup> *Id.*

<sup>81</sup> 42 U.S.C. 475 (5)(c)



- Placement and potential placement of the child;
- Compliance with the permanency plan;
- Whether the department has made reasonable efforts to finalize the permanency plan that is in place for the child, including the concurrent permanency goals for the child; and,
- Project a likely date that the permanency goal will be achieved.

The court should note on the record those present, those served yet absent and those not served. The court should inquire as to the efforts to locate the individuals not yet served including the steps DFPS has made and the level of cooperation from the parents.<sup>82</sup>

The court's overarching consideration is whether the child's placement is in the child's best interest. Again, the presumption is that the child should be returned to the parents if the parents can provide a safe environment and return is in the best interests of the child.<sup>83</sup> The court will look to attempts to locate and qualify relatives as a potential placement if the child is not returned home. The court will review the current placement and determine if it meets the child's needs. If the child is placed in an institution, the court will determine if the child is in the least restrictive placement and that the placement meets the special needs and best interests of the child.<sup>84</sup>

The court should review the parties' compliance with temporary orders and the Service Plan. It should determine if any changes or additional plans, services or orders are necessary to get the case where it needs to be for a final order. With the plans and the evidence at the hearing, the court will try to determine if progress has been made toward alleviating or mitigating those situations or conditions that caused the child to be removed. The court will also determine if additional services are needed. For example, if the child is over 16 years of age the court may need to order services to assist the child in transitioning to independent living.<sup>85</sup> The court will determine if reasonable efforts have been made to finalize the permanency plan in effect. The court should try to project a likely date that the child will be returned home, placed for adoption or in the Permanent Managing Conservatorship of a relative or DFPS.

### Subsequent Permanency Hearings

The court is required to hold a subsequent permanency hearing before the final hearing, if the final hearing is 120 days beyond the initial permanency hearing. The subsequent hearings must be held within 120 days of the prior permanency hearing. The court may on its own motion or the motion of one of the parties have more frequent hearings, as many courts do.<sup>86</sup> It is at this point that a court may order the parties to mediation, if they have not already participated, and the Department's attorney will have obtained trial settings. It is also at this hearing that an extension may be granted or an agreed Return and Monitor Order entered.

Prior to each subsequent permanency hearing DFPS is required to file a permanency progress report with the court and to provide copies to each party, the child's attorney *ad litem* and volunteer advocate no later than the tenth day prior to each permanency hearing, other than the initial hearing.<sup>87</sup>

### Best Interests

The "best interests" of the child is the paramount concern for the court. How is "best interest" established?

The factors the Court will consider to determine whether the parents are willing and able to provide the child with a safe environment and the return of the child is in the child's best interest are set out in Texas Family Code

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<sup>82</sup> *Id.* § 263.306(a)(2)

<sup>83</sup> *Id.* § 263.306(a)(4)

<sup>84</sup> *Id.* § 263.306(a)(9)

<sup>85</sup> *Id.* § 263.306(a)(10)

<sup>86</sup> *Id.* § 263.305

<sup>87</sup> *Id.* § 263.303(a)



§ 263.307. The statute states that the child's best interests lie in a placement in a safe environment and that such placement should be both prompt and permanent. The factors are:

- the child's age and physical and mental vulnerabilities;
- the frequency and nature of out-of-home placements;
- the magnitude, frequency, and circumstances of the harm to the child;
- whether the child has been the victim of repeated harm after the initial report and intervention by the department;
- whether the child is fearful of living in or returning to the child's home;
- the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
- whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
- whether there is a history of substance abuse by the child's family or others who have access to the child's home;
- whether the perpetrator of the harm to the child is identified;
- the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;
- the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;
- whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:
  - minimally adequate health and nutritional care;
  - care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;
  - guidance and supervision consistent with the child's safety;
  - a safe physical home environment;
  - protection from repeated exposure to violence even though the violence may not be directed at the child; and
  - an understanding of the child's needs and capabilities; and
- whether an adequate social support system consisting of an extended family and friends is available to the child.

In addition to these listed factors, when a child is 16 years old, the court must also consider if the permanency plan submitted to the court includes services for transition from foster care to independent living and whether such a transition would be in the best interests of the child.

Beyond these statutory guidelines, Texas courts have generally considered nine factors set out in *Holley v. Adams* to determine the best interest of the child.<sup>88</sup> Although similar to those specified in the Texas Family Code, the *Holley* factors do vary to some degree and are considered by the court to be neither exclusive nor exhaustive. The nine *Holley* factors are:

- 1) the desires of the child;
- 2) the emotional and physical needs of the child now and in the future;
- 3) the emotional and physical danger to the child now and in the future;
- 4) the parental abilities of the individuals seeking custody;
- 5) the programs available to assist these individuals to promote the best interest of the child;
- 6) the plans for the child by these individuals or by the agency seeking custody;
- 7) the stability of the home or proposed placement;
- 8) the acts or omissions of the parent, which may indicate that the existing parent-child relationship is not a proper one; and
- 9) any excuse for the acts or omissions of the parent.

### Achieving Permanency Outcomes

Once a child is placed in the temporary managing conservatorship of the Department, there are several possible outcomes that parties can settle on or that a judge can order for final resolution:

- **Reunification** — meaning the child is returned or reunified with one or both parents and the Department is dismissed.
- **Placement With a Relative** — meaning the child is placed with a biological relative, with conservatorship to the relative, and the Department dismissed. This can occur with or without termination of parental rights.
- **Placed for Adoption** — meaning the parents' rights are terminated, voluntarily or involuntarily, and the child is placed in the permanent managing conservatorship of the Department with the intent to be adopted by a relative or non-relative.
- **Permanent Managing Conservatorship without Termination** — meaning the child is placed in the permanent managing conservatorship of the state without the parental rights being terminated. Placement can be with a relative or other appropriate adult or in a foster care placement.

**» PRACTICE TIP :** In some cases, the child may have a stable, long-term placement with a relative who does not want to adopt, perhaps to avoid an adversarial relationship with the birth parents. Permanent managing conservatorship with the relative may be the best option, so long as the relative's reluctance to pursue adoption does not indicate a lack of commitment to the child. As discussed in more detail below, recent legislation implementing the Fostering Connections Act may provide financial assistance for relatives who become the child's permanent managing conservator.

<sup>88</sup> *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976).

Generally, if a child is not reunified with a parent, courts may grant termination of parental rights so the child may be adopted or grant permanent managing conservatorship (PMC) to the Department or to an individual other than the parent.<sup>89</sup> PMC can be awarded to the Department only if the court finds that appointment of a parent as managing conservator would “significantly impair the child’s physical health or emotional development; and it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator.”<sup>90</sup> An award of PMC to the Department without the termination of parental rights may relegate a young child to long-term foster care, and should only be done after considering the age and specific needs of the child.<sup>91</sup>

### Relatives as Permanent Placements

CPS rules state a preference for relative placements over other placements.<sup>92</sup> Relatives for this purpose can also mean “symbolic relatives,” or persons who have a significant, long-standing relationship with the child or the child’s family. Relatives are usually in a better position to meet a child’s need for belonging, stability, and continuity of care than unrelated caregivers.<sup>93</sup> In most cases, relatives have an ongoing relationship with the child’s parents, making it easier to work towards family reunification, when that is the goal.<sup>94</sup>

During the temporary managing conservatorship phase of the case, the Family Code requires, at *each hearing* in the Department’s case, that the Court place the child with a noncustodial parent, or if placement with the noncustodial parent is inappropriate, *with a relative*, unless placement with a relative is not in the best interest of the child.<sup>95</sup> If, at the time of the hearing, placement with a relative is not possible or is not in the child’s best interests, the Court must require, among other things, that the parent help locate other relatives who may be willing and able to care for the child.<sup>96</sup> This requirement means that the Department must continue to look for appropriate relatives, including alleged biological fathers, during the Department’s case.

### Interstate Compact for the Placement of Children (ICPC)

The Interstate Compact on the Placement of Children (ICPC) is the statutory mechanism to ensure protection and services to children who are placed across state lines for foster care or adoption.<sup>97</sup> The law was originally established with the purpose of creating orderly procedures for the interstate placement of children and fixing financial responsibility for placing the children.<sup>98</sup> However, the procedures required by the ICPC frequently lead to longer delays in placement.

Generally, the law requires that a juvenile or family court follow the ICPC any time the court sends or causes a child to be sent to another state.<sup>99</sup> Even though the ICPC includes provisions regarding judicial power and responsibility, it should not be construed as the basis on which state courts could determine custody of children placed across state lines.<sup>100</sup> The ICPC was actually intended to extend jurisdictional reach into borders of the receiving state solely for the purpose of investigating a proposed placement and supervising a placement once made, but it does not confer authority to adjudicate a custody case or otherwise modify orders.<sup>101</sup> The ICPC is procedural and its governance extends to placements only.

**A placement** is the arrangement for the care of a child in a foster home or in a child-caring agency or institution, including placement with a relative, or into a pre-adoptive home.

89 Tex. Fam. Code § 161.205; § 263.404

90 *Id.* § 263.404(a)

91 *Id.* § 263.404(b)

92 40 Tex. Admin. Code § 700.1320

93 *Id.* § 700.1320

94 *Id.*

95 Tex. Fam. Code §§ 262.201(f), 262.205(e), 263.306(a)(5)

96 *Id.*

97 See Tex. Fam. Code § 162.102 (codifying the ICPC).

98 See *id.* at art. I.

99 See NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES & AM. PUB. HUMAN SERVS. ASS’N (NCJFCJ), THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: A MANUAL AND INSTRUCTIONAL GUIDE FOR JUVENILE AND FAMILY COURT JUDGES 3 (Barbara Seibel ed., 2001).

100 See Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 296 (1989).

101 *Id.*

**What types of interstate placements are subject to the ICPC?**

The ICPC applies to the following:

- Placement preliminary to an adoption (adoptions include placements made by public agencies or birth parents);
- Placement into foster care (foster care placements are those in licensed/approved foster family homes, including homes of relatives);
- Placement with parents and relatives when a parent or relative is not making the placement; and
- Placement into a residential facility, (this form of foster care includes placements into residential treatment centers, group homes and child care institutions).

**What Types Of Interstate Placements Are Not Subject to the ICPC?**

The ICPC does not apply to the following:

- Placements into schools where the primary purpose for the placement is educational;
- Placements into medical and mental facilities;
- Placements made by a child's parent, stepparent, grandparent, adult sister or brother, adult aunt, or uncle, or non-agency guardian with any such relative or non-agency guardian.

The purpose of the ICPC is to protect the child and the party states in the interstate placement of children so that:

- The child is placed in a suitable environment;
- The receiving state has the opportunity to assess that the proposed placement is not contrary to the interests of the child and that its applicable laws and policies have been followed before it approves the placement;
- The sending state obtains enough information to evaluate the proposed placement;
- The care of the child is promoted through appropriate jurisdictional arrangements; and
- The sending agency or individual guarantees the child legal and financial protection.

**For more information on the ICPC, refer to the following:**

1. APHSA Guidebook: [http://icpc.aphsa.org/Home/Doc/Guidebook\\_2002.pdf](http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf)
2. ICPC Documents: <http://icpc.aphsa.org/Home/resources.asp>
3. NCJFCJ ICPC: A Manual and Instructional Guide for Juvenile and Family Court Judges: <http://www.ncjfcj.org/images/dlpdf.php?id=581>
4. State ICPC Offices: <http://icpc.aphsa.org/Home/states.asp>
5. State ICPC Contact List: <http://icpc.aphsa.org/home/doc/ICPCStateContactList.pdf>
6. Texas ICPC Court Improvement Program Assessment: <http://www.supreme.courts.state.tx.us/children/pdf/ICPC2008AssessmentReport.pdf>
7. CPS Handbook, Section 8300-8336, Interstate Compact for the Placement of Children: [http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_8300.jsp#CPS\\_8300](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8300.jsp#CPS_8300)
8. CPS Handbook, Section 9000-9422, Interstate Placements: <http://www.dfps.state.tx.us/handbooks/CPS/Menu/MenuCPS9000.jsp>

### Resources for Relative or Other Caretaker Placement

Services for caretakers other than foster parents are very limited, but have been expanding. The Family Code requires the Department to enter into “caretaker assistance agreements” with relative or non-relative caretakers with whom children in the Department’s managing conservatorship are placed.<sup>102</sup> Benefits available vary based on the relationship of the caretaker with the child, and eligibility criteria are very complex. For example, Temporary Assistance to Needy Families (TANF) grants are available to some caretakers, but not others. Grandparents, who are at least 45 years of age and with household income at or below 200% of the federal poverty level, are eligible for a one-time TANF grant of \$1000 to help integrate the child into the grandparent’s home. Other caretakers are not eligible for the “grandparent” benefit, but DFPS may make a one-time “integration payment” of \$1000 if the proper paperwork is submitted by the **second workday** after placement, and qualifying caretakers may receive up to \$500 in annual reimbursement for child-related expenses.<sup>103</sup>

Department policy requires that caseworkers request the court to appoint non-relative kinship caregivers (fictive kin) “possessory conservators” of the child in order to give the caretakers “legal status” prior to placement.<sup>104</sup> However, this requirement is often ignored in practice; arguably, the court’s approval of the placement is sufficient to give the caretaker “legal status” for purposes of the placement. Eligibility for caretaker assistance is means-tested. In addition to other requirements, household income must not exceed 300% of the federal poverty guidelines.<sup>105</sup>

### Fostering Connects to Success and Increasing Adoptions Act of 2008

In 2008, the federal Fostering Connects to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act) passed which allows states to implement a relative guardianship assistance program entitled the Permanency Care Assistance Program. During 2009, the Texas Legislature passed two bills authorizing the Texas implementation of this program. The program will provide financial assistance equal to or less than foster care rates to relatives who assume permanent custody for children in the state’s conservatorship, but only if the relative becomes a verified foster home and the child resides with the relative for at least six consecutive months after the verification and prior to the relative’s appointment as the permanent managing conservator of the child. The Department must adopt rules for this program by April 2010.<sup>106</sup>

## Placement Hearings

Once the Department is named the permanent managing conservator of a child, the court must hold a placement review hearing periodically until the child is adopted, placed with another suitable adult and conservatorship transferred to that person, or the child becomes an adult — or ages out of foster care. Chapter 263, Subchapter F governs the placement reviews. Until recently, placement review hearings needed to be held at least once every six months after the department became the permanent managing conservator of a child; after a 2009 legislative amendment to Family Code §263.501, if the parental rights to a child are terminated in the same final order appointing the department as permanent managing conservator, the first placement review hearing must be held not later than the 90th day after the date the court renders the final order.

### Placement Review Report

Similar to the requirement that the department file a progress report prior to every permanency hearing, the agency must continue to file a written update to the court prior to every placement review. A 2009 legislative amendment to Family Code §263.501 requires the department to continue looking for permanency for a child, even after the department is named permanent managing conservator of that child.<sup>107</sup>

<sup>102</sup> *Id.* § 264.755; CPS Handbook Item 6322.6

<sup>103</sup> CPS Handbook Item 6322.64

<sup>104</sup> CPS Handbook Item 6322.5.

<sup>105</sup> 40 Tex. Admin. Code § 700.1007; CPS Handbook Item 6322.

<sup>106</sup> Tex. Fam. Code § 264.851 et seq.

<sup>107</sup> Senate Bill 939, Section 9, 81st Texas Legislature (2009).

Family Code, as amended, §263.502 states:

- (a) Not later than the 10th day before the date set for a placement review hearing, the department or other authorized agency shall file a placement review report with the court and provide a copy to each person entitled to notice under Section 263.501(d).
- (b) For good cause shown, the court may order a different time for filing the placement review report or may order that a report is not required for a specific hearing.
- (c) The placement review report must *identify the department's permanency goal for the child and must*:
  - (1) evaluate whether the child's current placement is appropriate for meeting the child's needs;
  - (2) evaluate whether efforts have been made to ensure placement of the child in the least restrictive environment consistent with the best interest and special needs of the child if the child is placed in institutional care;
  - (3) contain a *transition* plan for a child who is at least 16 years of age that identifies the services and specific tasks that are needed to assist the child in making the transition from substitute care to adult living and describes the services that are *being provided* through the *Transitional Living Services Program* [previously Preparation for Adult Living] operated by the department
  - (4) evaluate whether the child's current educational placement is appropriate for meeting the child's academic needs;
  - (5) identify other plans or services that are needed to meet the child's special needs or circumstances;
  - (6) describe the efforts of the department or authorized agency to place the child for adoption if parental rights to the child have been terminated and the child is eligible for adoption, including efforts to provide adoption promotion and support services as defined by 42 U.S.C. Section 629a and other efforts consistent with the federal Adoption and Safe Families Act of 1997 (Pub. L. No. 105-89); and
  - (7) for a child for whom the department has been named managing conservator in a final order that does not include termination of parental rights, describe the efforts of the department to find a permanent placement for the child, including efforts to:
    - (A) work with the caregiver with whom the child is placed to determine whether that caregiver is willing to become a permanent placement for the child;
    - (B) locate a relative or other suitable individual to serve as permanent managing conservator of the child; and
    - (C) evaluate any change in a parent's circumstances to determine whether:
      - (i) the child can be returned to the parent; or
      - (ii) parental rights should be terminated.
- (d) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement, the placement review report must document a compelling



reason why adoption, permanent managing conservatorship with a relative or other suitable individual, or returning the child to a parent are not in the child's best interest.<sup>108</sup>

**» PRACTICE TIP : Institutional care should be a placement of last resort. Counsel for children in group homes and residential treatment facilities should assess whether the child's current placement is necessary to meet the child's needs, or whether the child can be safely transitioned to a less-restrictive, more family-like environment such as a parent's or relative's home with wraparound or other in-home services, or a therapeutic foster home. On the other hand, counsel should protect child clients against premature discharge from residential placements due to cost concerns, without adequate planning and preparation to ensure that a less-restrictive placement is stable and effective.**

### Addressing Permanency during Placement Review Hearings

New legislation reflects a renewed interest in working with parents or other suitable adults after a youth enters long-term foster care. The new amendments to the Texas Family Code §263.503 are a shift in direction in terms of achieving permanency for children. Because long-term foster care is not considered a truly "permanent" option for youth, this new legislation mandates that the department continue its efforts to achieve permanency for a youth, even after the agency is appointed as permanent managing conservator of a child. The new language authorizes a court to order the department to continue to provide family reunification services to a parent for a period not to exceed six months from the day of the placement review hearing under certain circumstances.

### Placement Review after Final Order — Section 263.501

- (a) If the department has been named as a child's managing conservator in a final order that does not include termination of parental rights, the court shall conduct a placement review hearing at least once every six months until the child becomes an adult.
- (b) If the department has been named as a child's managing conservator in a final order that terminates a parent's parental rights, the court shall conduct a placement review hearing *not later than the 90th day after the date the court renders a final order*. The court shall conduct additional placement review hearings at least once every six months until the date the child is adopted or the child becomes an adult.
- (c) Notice of a placement review hearing shall be given as provided by Rule 21a, Texas Rules of Civil Procedure, to each person entitled to notice of the hearing.
- (d) The following are entitled to not less than 10 days' notice of a placement review hearing and are entitled to present evidence and be heard at the hearing:
  - 1) the department;
  - 2) the foster parent, pre-adoptive parent, relative of the child providing care, or director of the group home or institution in which the child is residing;
  - 3) each parent of the child;
  - 4) each possessory conservator or guardian of the child;
  - 5) the child's attorney ad litem and volunteer advocate, if the appointments were not dismissed in the final order; and

<sup>108</sup> SB 939, Section 9, 81st Texas Legislature, 2009, signed June 19, 2009.

- 6) any other person or agency named by the court as having an interest in the child's welfare.
- (e) The licensed administrator of the child-placing agency responsible for placing the child is entitled to not less than 10 days' notice of a placement review hearing.
- (f) The child shall attend each placement review hearing unless the court specifically excuses the child's attendance. A child committed to the Texas Youth Commission may attend a placement review hearing in person, by telephone, or by videoconference. The court shall consult with the child in a developmentally appropriate manner regarding the child's permanency or transition plan, if the child is four years of age or older. Failure by the child to attend a hearing does not affect the validity of an order rendered at the hearing.
- (g) A court required to conduct placement review hearings for a child for whom the department has been appointed permanent managing conservator may not dismiss a suit affecting the parent-child relationship filed by the department regarding the child while the child is committed to the Texas Youth Commission or released under the supervision of the Texas Youth Commission, unless the child is adopted or permanent managing conservatorship of the child is awarded to an individual other than the department

### **Court Determinations Pursuant to Texas Family Code §263.503**

- (a) At each placement review hearing, the court shall determine whether:
  - 1) the child's current placement is necessary, safe, and appropriate for meeting the child's needs, including with respect to a child placed outside of the state, whether the placement continues to be appropriate and in the best interest of the child;
  - 2) efforts have been made to ensure placement of the child in the least restrictive environment consistent with the best interest and special needs of the child if the child is placed in institutional care;
  - 3) the services that are needed to assist a child who is at least 16 years of age in making the transition from substitute care to independent living are available in the community;
  - 4) other plans or services are needed to meet the child's special needs or circumstances;
  - 5) the department or authorized agency has exercised due diligence in attempting to place the child for adoption if parental rights to the child have been terminated and the child is eligible for adoption;
  - 6) for a child for whom the department has been named managing conservator in a final order that does not include termination of parental rights, a permanent placement, including appointing a relative as permanent managing conservator or returning the child to a parent, is appropriate for the child;
  - 7) for a child whose permanency goal is another planned, permanent living arrangement, the department has:
    - (A) documented a compelling reason why adoption, permanent managing conservatorship with a relative or other suitable individual, or returning the child to a parent is not in the child's best interest; and



- (B) identified a family or other caring adult who has made a permanent commitment to the child; and,
  - 8) the department or authorized agency has made reasonable efforts to finalize the permanency plan that is in effect for the child.
- (b) for a child for whom the department has been named managing conservator in a final order that does not include termination of parental rights, the court may order the department to provide services to a parent for not more than six months after the date of the placement review hearing if:
- 1) the child has not been placed with a relative or other individual, including a foster parent, who is seeking permanent managing conservator of the child; and
  - 2) the court determines that further efforts at reunification with a parent are:
    - (A) in the best interest of the child; and
    - (B) likely to result in the child's safe return to the child's parent.<sup>109</sup>

### New Focus on Dually Managed Youth

Although they don't constitute a large number of all youth in foster care, there are a number of youth who are in the legal conservatorship of DFPS but in the custody of the Texas Youth Commission (TYC) for delinquent conduct. Historically, once a youth in the conservatorship of DFPS entered the custody of TYC, the work of the DFPS caseworker for the youth and its family typically ceased. In some circumstances, courts dismissed the conservatorship of DFPS once the youth entered the custody of TYC.

During the 81st legislative session, the Texas Legislature amended the Texas Family Code to clarify the responsibilities of the courts, TYC and DFPS to youth in this situation.

Courts shall continue to hold hearings regarding the youth and shall determine whether the child's needs for treatment, rehabilitation, and education are being met.<sup>110</sup> A child committed to TYC may attend a permanency or placement hearing in person, by telephone, or by video teleconference.<sup>111</sup> A court required to conduct placement review hearings for a child for whom the department has been appointed permanency managing conservator may not dismiss a SACPR filed by the department regarding the child while the child is committed to TYC or released under the supervision of TYC unless the child is adopted or permanent managing conservatorship of the child is awarded to an individual other than the department.<sup>112</sup> If an order appointing DFPS as managing conservator of a child does not continue the appointment of the child's guardian ad litem or attorney ad litem and the child is committed to the Texas Youth Commission or released under supervision by the Texas Youth Commission, the court may appoint a guardian ad litem or attorney ad litem for the child<sup>113</sup>.

In permanency progress and placement review reports regarding these youth, DFPS must:

- (i) evaluate whether the child's needs for treatment and education are being met;
- (ii) describe, using information provided by TYC, the child's progress in any rehabilitation program administered by TYC; and
- (iii) recommend other plans or services to meet the child's needs.<sup>114</sup>

<sup>109</sup> SB 939, section 10.

<sup>110</sup> Tex. Fam. Code §§ 263.306(a) and 263.503

<sup>111</sup> *Id.* §§ 263.302 and 263.501.

<sup>112</sup> *Id.*, § 263.501(g).

<sup>113</sup> Tex. Fam. Code § 107.0161.

<sup>114</sup> *Id.*, §§ 263.303(b)(2)(G) and 263.502(c)(7).

**» PRACTICE TIP :** Counsel for the child can have substantial influence on the outcome of a juvenile delinquency case, e.g. by making the juvenile delinquency court aware of family circumstances affecting the child, presenting positive or mitigating information about the child, and/or advocating for alternatives to commitment to a juvenile justice facility. Counsel should stay informed about the status of any pending juvenile delinquency case, confer with the child's juvenile public defender and probation officer, and, if feasible, attend juvenile delinquency court hearings.

### Extended jurisdiction

Although the Texas Family Code defines a "child" as a person less than 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, some Texas courts who hear child protection cases continue holding hearings even after a youth's 18th birthday. During the 81st legislative session, the Texas Legislature enacted Texas Family Code §263.601, entitled "Extended Jurisdiction after Child's 18th Birthday." Pursuant to this section, a court may continue its jurisdiction in a CPS-related case in two circumstances:

- 1) upon the request of a person between 18 and 21 years of age who was in the conservatorship of DFPS on the day before the person's 18th birthday and after the person's 18th birthday, resides in foster care or receives transitional living services from the department; or
- 2) if the court believes that a young adult may be incapacitated as defined by the Texas Probate Code, without the young adult's consent and on its own motion, extends jurisdiction to allow the department to refer the young adult to the Department of Aging and Disability Services for guardianship services.<sup>115</sup>

If the court extends its jurisdiction, it may continue or renew the appointment of an attorney ad litem, guardian ad litem, or volunteer advocate for the young adult to assist the young adult in accessing services the young adult is entitled to receive from the department or any other public or private service provider.<sup>116</sup> An attorney ad litem or guardian ad litem appointed for a young adult who receives services in the young adult's own home from a service provider or resides in a institution that is licensed, certified, or verified by a state agency other than the department shall assist the young adult as necessary to ensure that the young adult receives appropriate services from the service provider or institution, or the state agency that regulates the services provider or institution.<sup>117</sup>

If jurisdiction is extended, the applicable court may hold periodic service review hearings or the young adult may request a hearing.<sup>118</sup>

<sup>115</sup> Tex. Fam. Code §§ 263.601, 263.602, 263.603, and 263.604.

<sup>116</sup> *Id.*, § 263.605.

<sup>117</sup> *Id.*, § 263.606.

<sup>118</sup> *Id.* § 263.609.

The Texas Family Code mandates that the trial court must dismiss the suit affecting the parent child relationship (SAPCR) filed by the Department on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator unless the court has commenced the trial on the merits.<sup>1</sup> There are exceptions to this rule, as set out in Texas Family Code §263.401, but well before the one-year deadline approaches, parties to the case should have some idea what the final resolution will look like.

### What is a Final Order?<sup>2</sup>

A “final order” is an order that: (1) requires that a child be returned to the child’s parent; (2) names a relative of the child or another person as the child’s managing conservator; (3) without terminating the parent-child relationship, appoints DFPS as the managing conservator of the child; or (4) terminates the parent-child relationship and appoints a relative of the child, another suitable person, or DFPS as managing conservator of the child.<sup>3</sup>

### Finding Required for Extension of 180 Days

A trial court may, but is not required to grant an extension of the one-year deadline and in fact is discouraged from doing so. The court may not “retain the suit on the court’s docket after the time described by Subsection 263.401(a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of DFPS and that continuing the appointment of DFPS as temporary managing conservator is in the best interest of the child.”<sup>4</sup> If an extension is granted, the court has a mandatory duty to (1) schedule the new date for dismissal of the suit not later than the 180th day after the one-year deadline; (2) make further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and (3) set a final hearing on a date that allows the court to commence the trial on the merits before the required date for dismissal of the suit under this subsection.<sup>5</sup>

### Final Deadline after 180 Day Extension

Although a trial court is not required to grant an extension of the one-year deadline, if the extension is granted, the court must set a new date for dismissal. The court may not grant a further extension beyond the absolute deadline of 180 days after the original dismissal date.<sup>6</sup> However, a “monitored return” of the child to the child’s parent may be ordered at any time before the dismissal date, and may have the effect of extending the deadline beyond the “drop dead” date in some cases.

### Monitored Return

At any stage of the case, the court may order a “monitored return” of the child to a parent with the Department remaining as temporary managing conservator. The monitored return cannot be for more than 180 days, but may be ordered without regard to the other deadlines. If the parent successfully completes the 180 day monitoring period, the Department’s suit must be dismissed.<sup>7</sup> If the experiment fails and the child returns to temporary foster

<sup>1</sup> Tex. Fam. Code § 263.401.

<sup>2</sup> For suits filed prior to June 1, 2007, the statute required that a final order be rendered by the one-year deadline. See 80th Legis. Reg. Sess, 2007, H.B.1481 (text and history available at Texas Legislature Online at: <http://www.legis.state.tx.us/>).

<sup>3</sup> Tex. Fam. Code § 263.401(d) (repealed, eff. June 15, 2007).

<sup>4</sup> *Id.* § 263.401(b).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 263.401(c).

<sup>7</sup> *Id.* § 263.403(b).

care, the court must designate yet another new dismissal date, which may be the later of the original dismissal date or the 180th day after the child's return to temporary foster care.<sup>8</sup> The requirements of this section must be strictly followed if the "monitored return" is to prevent mandatory dismissal of the Department's suit.<sup>9</sup>

**» NOTE :** A recent Texas Supreme Court decision, construing the statute as it existed prior to the 2007 amendment, held that the statutory dismissal dates are not jurisdictional — that is, they can be waived. However, the Supreme Court also held that the trial court's granting of a new trial after rendition of a termination order revived the original dismissal deadline, and the respondent's attorney did not waive her right to demand dismissal. The dissenting justices would have found that the granting of a new trial did not undo the timely "rendition" for purposes of the statute (J. Hecht) or that in any event, by requesting the new trial the parent waived the deadline (J. Brister). *In re Department of Family and Protective Services*, No. 08-0524 \_\_\_\_ S.W.3d \_\_\_\_ (Tex 2009). It is unclear whether the trial court would be required to "commence" the trial again within the original deadlines if a new trial is granted in a case filed after June 15, 2007. At least four members of the court say commencing the trial one time complies with the statute.

### When Time Limits Do Not Apply

It should be noted that there is no time limit on the court's authority to maintain a case on the docket when DFPS is not appointed as temporary managing conservator, as for example, when parents are ordered to cooperate with services, but the children are either not removed or are placed with relatives. In rare cases, DFPS may simply be in support of a protective parent or relative who gets temporary managing conservatorship and, ultimately, permanent managing conservatorship of the child. No time limits apply to the resolution of the "private" or "court ordered services" cases, because DFPS is not appointed the child's managing conservator.

Although the Texas Family Code provisions regarding mandated hearings do not apply to these cases, some courts may hold scheduled hearings on them in the same manner as the cases with a 12-month deadline. Theoretically, these cases might stay on a court's docket indefinitely.

### Dismissal of Lawsuit

Dismissal of the Department's suit leaves the parties and the children as they were before the suit was filed, if temporary orders are vacated and no further orders are entered. Dismissal of the Department's suit, standing alone, does not immediately vacate the temporary orders in the case. The El Paso Court of Appeals has held that once a trial court acquires jurisdiction over minor children and enters temporary orders concerning their custody "such orders survive any subsequent dismissal of the underlying divorce action and continue in effect until a court of competent jurisdiction modifies them or provides for permanent custody of the children."<sup>10</sup> This rationale should apply with even more force in an abuse or neglect case. If the parents are together and will remain so, or if prior orders exist and are appropriate, then dismissal of the temporary orders in the case may be appropriate. In most cases, however, true "permanency" for the child will require orders granting conservatorship to one parent or an appropriate relative, providing for child support if either parent is able to pay, or terminating the parental rights of inappropriate or dangerous parents so the child may remain stable in the placement.

<sup>8</sup> *In re J.W.M.*, 153 S.W.3d 541, 545 (Tex.App. – Amarillo 2004, pet. denied).

<sup>9</sup> *In re Neal*, 4 S.W.3d 443 (Tex. App – Houston [1st Dist.] 1999, orig. proceeding).

<sup>10</sup> *Smelser v. Smelser*, 901 S.W.2d 708, 711 n. 4 (Tex.App. – El Paso 1995, no writ).

Dismissal of the suit filed by the Department also does not bar another party with standing from proceeding to trial on the suit against the parents.<sup>11</sup> The Department may file a new petition after dismissal, but must look to the current situation in the home in order to find evidence sufficient to overcome the presumption of a return.<sup>12</sup> However, to determine if there is a continuing danger, the court may consider if a person in the household has previously caused serious injury or death of or who has sexually abused another child.<sup>13</sup>

### Mandatory Dismissal

Parties to the suit may not extend the deadlines by agreement or otherwise. The court must dismiss the case pursuant to Section 263.401, which requires dismissal if a trial on the merits is not commenced within the statutory time limitation.<sup>14</sup>

### Case Resolution

At the final hearing, the court must decide who should have custody of the child and what steps are necessary to resolve the problems that led to removal. The court must enter a final order,<sup>15</sup> that:

- Reunifies the child with the parent or other individual from whom the child was removed;
- Names a relative of the child or another person as the child's managing conservator;
- Without terminating the parent-child relationship, appoints DFPS as managing conservator; or,
- Terminates the parent-child relationship and appoints a relative of the child, another person or DFPS as the managing conservator with the right to consent to adoption.<sup>16</sup>

### Mediation

Alternative Dispute Resolution (ADR) involves a number of different procedures to resolve a case short of trial. ADR is a collaborative process, with the goal of avoiding litigation and resolving the issues in a non-adversarial manner.

One of these ADR procedures is mediation. Mediation is a practice aimed at resolving disputes in a confidential, non-adversarial, non-judgmental setting. The U.S. Department of Health and Human Services, Adoption 2002 Guidelines state, "Mediation in the child welfare context is well-established in many jurisdictions. It is commonly defined as 'an intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power but who assists the disputing parties in voluntarily reaching their own mutually acceptable settlement of disputed issues in a non-adversarial setting.'" The Guidelines recommend that mediation be available "prior to the filing of a court petition and throughout the legal process, up to and including relinquishment or termination of parental rights, adoption, and guardianship."

Mediation programs vary in practice and process. However, mediation generally involves trained, neutral third-party mediators, parents, caseworkers, attorneys and other interested parties. The goal is to arrive at a mutually agreeable settlement on the issues in question. If an agreement is reached, it is presented to the court, and the court may accept it, reject it, or modify it depending on the circumstances.

11 *In re Bishop*, 8 S.W. 3d 412, 420 (Tex. App. – Waco 1999, orig. pet.) (dismissal is "without prejudice" and does not affect pleadings of intervenor relative and guardian ad litem); *I.*, No. 2-07-081-CV, 250 S.W. 3d 486 (Tex. App. – Ft. Worth 2008, no pet. hist.) (foster parents sought and obtained termination of parent's rights after DFPS's suit was dismissed).

12 A parent must be appointed managing conservator of unless the appointment would "significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). See also *In re Cochran*, 151 S.W.3d 275 (Tex.App. – Texarkana 2004, orig. proceeding) (past terminations alone not sufficient to deny placement with parents absent evidence of current danger to the health or safety of the child).

13 Tex. Fam. Code § 262.201(d).

14 *Id.* § 263.401.

15 A final order is an order that disposes of all parties and claims in the lawsuit. *Childers v. Adv. Found. Rpr., L.P.*, 193 S.W.3d 897 (Tex. 2006)

16 The Family Code no longer defines the required terms of a final order, but the Department's permanency goals must include, in order of preference, the following options: (1) reunification; (2) termination of parental rights and adoption by a relative or other suitable adult; (3) permanent managing conservatorship to a relative or other suitable adult; or (4) another planned, permanent living arrangement for the child (PMC to the department without termination). Tex. Fam. Code § 263.3036(a). APPLA is disfavored, and the Department must "document that there is a compelling reason" why the other options are not in the child's best interest. Tex. Fam. Code § 263.3036(b).

Mediation in a CPS case involves many complex issues. Section 153.0071 of the Texas Family Code governs mediation in family law cases and it applies to mediation outcomes in a CPS case. A court may refer a CPS case to mediation and the mediated settlement agreement is binding on all parties if the agreement:

- 1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
- 2) is signed by each party to the agreement;
- 3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.<sup>17</sup>

If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on it, and a court may only decline to enter a judgment if the court finds that:

- 1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
- 2) the agreement is not in the child's best interest.<sup>18</sup>

CPS Mediations often have one of the following outcomes:

- Relinquishment of parental rights, child in sole managing conservatorship of the Department
- Relinquishment of parental rights, PMC of child to relative or another suitable adult
- Parent may enter into a PMC / PC relationship with another adult or Department, rights of the parent are not severed, although Agreements in which the Department is the PMC/PC or JMC are not favored because they prevent adoption and relegate a child to long-term foster care

### **Post-Termination Contact Agreements**

For some time, a number of CPS mediations resulted in the Department seeking to find an adoptive placement which allowed minimal contact between the biological parent and the child. In 2003, the Texas Legislature enacted Texas Family Code §§161.2061 and 161.2062, which allowed and set limits for post-termination contact agreements.

Post-termination contact may be included in an order terminating the parent-child relationship if:

- 1) the biological parent has filed an affidavit of voluntary relinquishment of parental rights pursuant to Texas Family Code section 161.103;
- 2) the post-termination contact is in the agreement of the biological parent and the Department; and
- 3) the court finds it to be in the best interest of the child.<sup>19</sup>

If the prerequisites of Texas Family Code Section 161.2061(a) are met, an order of termination may include terms that allow the biological parent to:

- 1) receive specified information regarding the child;
- 2) provide written communications to the child; and
- 3) have limited access to the child.<sup>20</sup>

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<sup>17</sup> *Id.* § 153.0071(d).

<sup>18</sup> *Id.* § 153.0071(e), (e-1).

<sup>19</sup> *Id.* § 161.2061(a).

<sup>20</sup> *Id.* § 161.2061(b).



Prior to the enactment of Section 161.2061, it was unclear whether a mediated settlement agreement which included terms of post-termination contact would be enforceable. Texas Family Code Section 161.2061(c) permits the terms of an order of termination regarding limited post-termination contact to be enforced only if the party seeking enforcement pleads and proves that, before filing the motion for enforcement, the party attempted in good faith to resolve the disputed matters through mediation. The terms of an order of termination regarding post-termination contact are not enforceable by contempt and they may not be modified.<sup>21</sup> An order entered pursuant to §161.2061 does not affect the finality of a termination order or grant standing to a parent whose parental rights have been terminated to file any action under Title 5 of the Texas Family Code other than a motion to enforce the terms regarding limited post-termination contact *until* the court renders a subsequent adoption order with respect to the child.<sup>22</sup>

Terms of post-termination contact are not required to be included in a subsequent adoption order.<sup>23</sup> If the terms of post-termination contact are included in a termination order, it does not affect the finality of the termination or the subsequent adoption or grant to the parent whose parental rights have been terminated to file any action under Title 5 of the Texas Family Code after the court renders a subsequent adoption order with respect to the child.<sup>24</sup>

**» PRACTICE TIP :** Counsel for children and parents should consider post-termination contact agreements in cases where the child cannot safely return to the parents, but the child and parents have a close and positive relationship. Such agreements can help avoid adversarial proceedings and preserve ties to a child’s birth family while ensuring permanence and stability through adoption.

## Final Trial

If the Department proceeds to trial, it has the burden to show that parental rights should be terminated or that the Department or another non-parent should be appointed the permanent managing conservator of the child. A final order may be rendered by a court after a bench or jury trial, on an uncontested docket, or as part of a hearing during which a default judgment is taken against a parent.

## Burden of Proof

### *For Managing Conservatorship to the Department*

Where the Department is asking a court to grant conservatorship to the Department or to an individual other than the parent, the burden of proof is preponderance of the evidence — not clear and convincing. A parent may also seek to have conservatorship awarded to an individual of their choice, and the burden of proof for the parent would also be preponderance of the evidence that conservatorship to that individual is in the best interest of the child. However, if the Department is seeking to terminate parental rights, the parent must defend against the termination and may be able to argue that a less drastic step than termination is managing conservatorship to a relative.

### *For Termination of Parental Rights*

In a termination suit, the Department has the burden to present “clear and convincing evidence” of at least one ground for termination and that termination of the parent-child relationship is in the best interest of the child.<sup>25</sup> “Clear and convincing evidence” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.<sup>26</sup>

<sup>21</sup> *Id.* §§ 161.2061(d) and (e).

<sup>22</sup> *Id.* § 161.2061(f).

<sup>23</sup> *Id.* § 161.2062(a).

<sup>24</sup> *Id.* § 161.2062(b).

<sup>25</sup> *See Id.* §§ 161.001, 161.002, 161.003, 161.004, 161.103, 161.106, 161.204.

<sup>26</sup> *Id.* § 101.007.

***Required Findings******Must Overcome Presumption that Parent Appointed Managing Conservator***

Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child. It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption.<sup>27</sup>

***Must Overcome Presumption that Parent Appointed Possessory Conservator***

The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.<sup>28</sup>

***PMC to DFPS without termination***

Under Texas Family Code §263.404, the court may appointment the Department as managing conservator without terminating parental rights if the court *makes* the following findings:

- 1) That appointment of parent as managing conservator is not in the child's best interest because it would significantly impair the child's health or emotional development; and
- 2) It would not be in the child's best interest to appoint a relative or another person managing conservator.

In addition to the best interest criteria, the court may also take into consideration the following factors:

- 1) if the child is over 15 years of age;
- 2) the child is at least 12 and has expressed a strong desire against termination or being adopted;
- 3) that the child has special medical or behavioral needs that makes adoption unlikely; and,
- 4) the needs and desires of the child.

***If DFPS Seeks to Modify Prior Final Order***

The court may modify an order that provides for the appointment of a conservator of a child, the terms and conditions of conservatorship, or for the possession of or access to a child, if modification would be in the bet interest of the child and:

- 1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of:
  - (A) the date of the rendition of the order; or
  - (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based;
- 2) the child is at least 12 years of age and has expressed to the court in chambers pursuant to Texas Family Code §153.009, the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or,

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<sup>27</sup> Tex. Fam. Code § 153.131.

<sup>28</sup> Tex. Fam. Code § 153.191.



- 3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.<sup>29</sup>

### Parties and Potential Parties

If the individuals entitled to notice and service under Chapter 102 of the Family Code have been properly noticed,<sup>30</sup> and a proper search for relatives or other placements has been made as required by Chapters 262 and 263 of the Family Code has been made, final trial preparation should not involve dealing with new parties. Among the persons entitled to intervene in the CPS suit, are self-alleged biological fathers,<sup>31</sup> and individuals with custodial or visitation rights under orders from another state or country.<sup>32</sup> Individuals entitled to service of citation may, if not served, also intervene in the CPS suit. Among these are individuals previously appointed as managing or possessory conservator of the child,<sup>33</sup> and persons having “possession or access” to the child under an order, as for example in a grandparent visitation order.<sup>34</sup>

Although the Family Code attempts to provide finality for children by limiting the time for appeals and restricting direct or collateral attacks on a judgment of termination of parental rights, the legislature has also recognized the countervailing interest of the child’s family. For example, if an order terminating the parent-child relationship is entered without providing an opportunity for participation by “an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child,” the person may file a motion to modify the order changing managing conservatorship from the department to the person within 90 days after the termination of parental rights.<sup>35</sup> An adult sibling of a child, who is separated from the child because of the action taken by the Department, may file a motion to modify or an original petition for access to the child without regard to whether the issue of managing conservatorship is an issue in the suit.<sup>36</sup>

Preparation for final trial should include a careful inquiry as to whether all relative and sibling issues have been or will be resolved in a way that will not provoke further litigation.

### Discovery

Although discovery is discussed in this manual as part of trial preparation, in reality, many practitioners propound and review discovery throughout the pendency of the case. Many jurisdictions use a Discovery Control Plan which limits the amount of discovery that can be conducted. This is done in an effort to curb trial expenses which are born by the county. *For more information, see discussion of discovery in Chapter 9, Trial Preparation.*

### Preferential Setting for Termination Trials

After hearing, the court shall grant a motion for a preferential setting for a final hearing on the merits in a termination suit filed by a party to the suit or the attorney ad litem for the child. The court shall give precedence to that hearing over other civil cases if: 1) termination would make the child eligible for adoption, and 2) discovery has been completed or sufficient time has elapsed since the filing of the suit for the completion of all necessary and reasonable discovery if diligently pursued.<sup>37</sup>

### Proceeding to Trial if Criminal Case Pending

A parent whose rights are subject to termination of the parent-child relationship and against whom criminal charges are filed that directly relate to the grounds for which termination is sought may file a motion requesting

<sup>29</sup> Tex. Fam. Code § 156.101.

<sup>30</sup> Tex. Fam. Code § 102.009.

<sup>31</sup> Tex. Fam. Code § 102.003(a)(8).

<sup>32</sup> Tex. Fam. Code § 102.003(a)(3).

<sup>33</sup> Tex. Fam. Code § 102.009(a)(1) & (2).

<sup>34</sup> Tex. Fam. Code § 102.009(a)(3).

<sup>35</sup> Tex. Fam. Code § 102.006(c).

<sup>36</sup> Tex. Fam. Code § 102.0045 and § 153.551.

<sup>37</sup> *Id.* § 161.202.

a continuance of the final trial in the suit until the criminal charges are resolved.<sup>38</sup> The court may grant the motion only if the court finds that a continuance is in the best interest of the child. Notwithstanding any granted continuance, the court shall conduct status and permanency hearings with respect to the child as required by Chapter 263 and shall comply with the dismissal date under Texas Family Code §263.401.<sup>39</sup> This section cannot interfere with the trial court's right to issue temporary orders.<sup>40</sup> The trial court has specific authority to deny a parent access to the child if the indictment is for criminal activity that constitutes a ground for termination of parental rights.<sup>41</sup>

## Jury Trial

A party to a SAPCR seeking to terminate parental rights is entitled to a trial by jury.<sup>42</sup> When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested.<sup>43</sup>

## Termination of Parental Rights

*Much of the following is an excerpt from the Article, **Grounds for Termination of Parental Rights**, published as part of a Family Code Supplement to Sampson & Tindall's Texas Family Code Annotated, January 2008 Edition (Thompson West), and reprinted here with permission of the authors, Trevor A. Woodruff, Duke Hooten, and Charles G. Childress.<sup>44</sup> This article is listed under "articles and papers" under the title, Grounds for Termination of Parental Rights, and found at the following link: <http://www.texaslawyersforchildren.org/>. The excerpt has been updated to reflect changes in the law since publication in 2008.*

### Introduction

The Due Process Clause of the Fourteenth Amendment requires the State to support the "parental unfitness" finding in a termination case by clear and convincing evidence.<sup>45</sup> Clear and convincing evidence is defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."<sup>46</sup> The Texas Family Code requires that termination of parental rights be supported by clear and convincing evidence (1) of a statutory termination ground, *and* (2) that termination is in the best interest of the child.<sup>47</sup> "Only one predicate finding under § 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."<sup>48</sup>

Since July 3, 2002, the clear and convincing evidence standard at trial requires a higher standard of factual sufficiency review on appeal.<sup>49</sup> On December 31, 2002, the Texas Supreme Court announced a new standard of legal sufficiency review.<sup>50</sup> Caution should be exercised in using appellate decisions prior to those dates. While the *type* of evidence that may be considered in applying the various grounds for termination remains the same, the *quantity* of evidence necessary to sustain the judgment on appeal may be higher.

The Legislature provides numerous statutory grounds for terminating of an individual's parental rights. Termination of parental rights is final and irrevocable. An order termination the parent-child relationship "divests the parent and the child of all legal rights and duties with respect to each other, except that the child may retain

38 *Id.* § 161.2011(a).

39 *See In re Texas Department of Protective and Regulatory Svcs*, 71 S.W.3d 446 (Tex. App. – Fort Worth 2002, orig. proceeding) (mandamus granted to require that trial court set cases before the dismissal date).

40 Tex. Fam. Code § 161.2011(b).

41 *Id.* § 161.2011(c).

42 *Id.* § 105.002. *See* "Jury Selection" section at the end of Chapter 9, Trial Preparation, for information and tips on preparing for a jury trial.

43 Tex.R. Civ. P. 220.

44 This article is a revised and updated version of previous articles. *Grounds for Termination of Parental Rights*, in State Bar of Tex. Family Law Section Report (Fall 2005) and *Grounds for Termination of Parental Rights*, in State Bar of Tex. Family Law Section Report (Winter 2003/04).

45 *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980).

46 Tex. Fam. Code § 101.007.

47 *Id.* § 161.001.

48 *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

49 *In re C.H.*, 89 S.W.3d 17 (Tex. 2002).

50 *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).

the right to inherit from and through the parent.”<sup>51</sup> However, a parent may be ordered to pay post-termination child support for a child in foster care under the managing conservatorship of the Department of Family and Protective Services (“the Department”) until the child is adopted or emancipated.<sup>52</sup> The court may also order limited post-termination contact *between a parent who files an affidavit of voluntary relinquishment of parental rights* and a child until the child is adopted.<sup>53</sup>

Parental rights are of constitutional magnitude, but “they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.”<sup>54</sup> The state has a duty to protect the safety and welfare of its citizens, including minors; therefore, the state has the duty to intervene, when necessary, in the parent-child relationship. Although a termination suit can result in loss of a parent’s legal relationship with the child, the primary focus of the suit is protecting the best interests of the child, not punishing the parent. Protection of the child is paramount; the “rights of parenthood are accorded only to those fit to accept the accompanying responsibilities.”<sup>55</sup>

Common to all the grounds for termination of parental rights, including the suit by a petitioner to terminate his or her own rights, is a requirement that the court find the termination to be in the best interest of the child. This article will therefore address first the issue of “best interest” and then consider the various substantive “grounds” that statutorily justify termination of parental rights.

### Best Interest

Termination of parental rights cannot be granted unless it is shown by clear and convincing evidence to be in the child’s best interest.<sup>56</sup>

In 1976, *prior* to the adoption of the “clear and convincing evidence” standard in termination suits, the Texas Supreme Court *reversed and rendered* a termination order in a private case, finding that there was no evidence to support the trial court’s finding that termination of the mother’s parental rights would be in the best interest of the child.<sup>57</sup> The *Holley* factors are still used to evaluate the evidence relating to best interest, which include, but are not limited to, the following:

- the desires of the child;
- the emotional and physical needs of the child now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parenting abilities of the parties seeking custody;
- the programs available to assist these persons;
- the plans for the child by the parties seeking custody;
- the acts or omissions of the parent and any excuse for same;
- and the stability of the home or proposed placement.<sup>58</sup>

Additional statutory factors for determining the best interest of a child when the Department is a party to the suit include a preference for a “prompt and permanent placement of the child in a safe environment” and a list of

<sup>51</sup> Tex. Fam. Code § 161.206(b).

<sup>52</sup> *Id.* § 154.001(a-1).

<sup>53</sup> *Id.* § 161.2061.

<sup>54</sup> *In re C.H.*, 89 S.W.3d at 26.

<sup>55</sup> *In re A.V.*, 113 S.W.3d at 361 (Tex. 2003).

<sup>56</sup> Tex. Fam. Code § 161.001(2).

<sup>57</sup> *Holley v. Adams*, 544 S.W.2d 367, 373 (Tex. 1976).

<sup>58</sup> *Id.* at 372.

factors to be considered in determining whether the child's parents are willing and able to provide the child with a safe environment.<sup>59</sup>

Following *Holley* and applying the “clear and convincing” evidence standard, as well as heightened standards of appellate review, several courts of appeals have reversed termination orders on the ground that the evidence of “best interest” was insufficient. In reversing one such appellate ruling, the Texas Supreme Court observed:

- The absence of evidence about some of these (*Holley*) considerations would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child. Other cases, however, will present more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice to uphold the jury's finding that termination is required.<sup>60</sup>

The court also clarified the application of one of the enumerated *Holley* factors, “the plans for the child by the parties seeking custody,” by stating:

- Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a fact finder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest — even if the agency is unable to identify with precision the child's future home environment.<sup>61</sup>

The court in *C.H.* also explicitly ruled that evidence used to prove termination under section 161.001 may also be used to meet the “best interest” prong, stating that “[w]hile it is true that proof of acts or omissions under § 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues.”<sup>62</sup> On remand the court of appeals found “that the record contains evidence of specific acts, inaction, and a pattern of conduct that [the father] is incapable of child-rearing and that a reasonable jury could form a firm conviction or belief from all the evidence that termination would be in [the child's] best interest.”<sup>63</sup>

**» PRACTICE TIP :** Counsel for children should consider whether to oppose termination of parental rights in situations where adoption is unlikely, e.g. in cases where an older child does not want to be adopted, or a large sibling group does not want to be separated. Becoming a “legal orphan” through termination of parental rights generally does not benefit the child unless it leads to adoption. This is a fine balancing test that must be considered when determining whether to oppose or support termination of parental rights.

<sup>59</sup> Tex. Fam. Code § 263.307.

<sup>60</sup> *In re C.H.*, 89 S.W.3d 17, 25-26 (Tex. 2002).

<sup>61</sup> *Id.* at 28.

<sup>62</sup> *Id.*

<sup>63</sup> *In re C.H.*, No. 08-98-183-CV, 2003 Tex. App. LEXIS 1967, \*1 (Tex. App. – El Paso Mar. 6, 2003) (mem. op.).

## Termination Grounds

### *Voluntary or Constructive Abandonment*

Seven of the termination grounds found in Section 161.001 are predicated on actual or constructive abandonment of the child. Parental rights may be terminated for voluntary or constructive abandonment if the parent has:

- voluntarily left the child alone or in the possession of another not the parent, and expressed an intent not to return;<sup>64</sup>
- voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;<sup>65</sup>
- voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;<sup>66</sup>
- abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;<sup>67</sup>
- voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
- constructively abandoned a child in TDPRS conservatorship or an authorized agency for not less than six months and, despite reasonable efforts made by TDPRS or the authorized agency to return the child to the parent, the parent has not regularly visited or maintained significant contact<sup>68</sup> with the child and has demonstrated an inability to provide the child with a safe environment;<sup>69</sup> or
- voluntarily delivered the child to a designated emergency infant care provider under § 262.302 without expressing an intent to return for the child.<sup>70</sup>

The duration of time required to show abandonment varies among these seven grounds, depending upon evidence of the parent's express or implied intent to abandon the child. There is no minimum time requirement for the clearest forms of abandonment; *i.e.*, when the parent demonstrates, by words or by actions, a clear intent to abandon the child.<sup>71</sup> There is a six-month requirement where the parent's intent to abandon the child is less clear.<sup>72</sup> Evidence that would support an abandonment ground may also serve as proof of a non-abandonment termination ground. For example, where evidence supported constructive abandonment and failure to comply with a court order [ §§ 161.001(1) (N) and (O) ], but these grounds were not pled, the same evidence was cited to support termination under the pled termination grounds, [ §§ 161.001(1) (D) and (E) ].<sup>73</sup>

<sup>64</sup> Tex. Fam. Code § 161.001(1)(A).

<sup>65</sup> *Id.* § 161.001(1)(B).

<sup>66</sup> *Id.* § 161.001(1)(C).

<sup>67</sup> *Id.* § 161.001(1)(G).

<sup>68</sup> *Id.* § 161.001(1)(H).

<sup>69</sup> *Id.* § 161.001(1)(N).

<sup>70</sup> *Id.* § 161.001(1)(S).

<sup>71</sup> *Id.* §§ 161.001(1)(A), (G), (S).

<sup>72</sup> *Id.* §§ 161.001(1)(C), (N).

<sup>73</sup> See *In re J.O.C.*, 47 S.W.3d 108, 112 (Tex. App. – Waco 2001, no pet.).

## Endangerment

The two endangerment grounds are the most commonly pled grounds in termination suits. These grounds typically are pled together and are often referred to as “the (D) and (E) grounds”. Termination of parental rights may be granted if a parent has:

- knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or
- engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child.<sup>74</sup>

The (D) ground focuses by its terms on the child's conditions or surroundings and the parent's knowing involvement with that placement. The (E) ground focuses on a parent's conduct or the conduct of persons with whom the parent placed the child. Some courts have interpreted these sections to require different types of proof, while others draw little distinction between the two grounds, reasoning that a parent's “conduct” creates the conditions or surroundings that place the child at risk. The Texas Supreme Court has determined that endangerment is more than a threat of theoretical injury or possible ill effects of a “less-than-ideal” family environment.<sup>75</sup> The court has defined “endanger” as to expose to loss or injury or to jeopardize.<sup>76</sup> The endangering conduct does not have to be directed at the child nor does the child have to actually suffer injury.<sup>77</sup> “Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D). For example, an environment which routinely subjects a child to the probability that he will be left alone because his parents or caregivers are incarcerated endangers both the physical and emotional well-being of a child.”<sup>78</sup> Conduct of the parent both before and after the child's birth “is relevant to the determination of whether the conduct endangers the child's physical or emotional well-being.”<sup>79</sup> Where the parent “had used heroin, cocaine, methamphetamines, and marijuana from the age of twelve until the time of trial,” failed to complete drug rehabilitation programs, had given birth to one of the children with cocaine and marijuana in his body at birth, and continued to smoke around the child in spite of his health problems, the evidence supported termination on (D) and (E) grounds.<sup>80</sup>

## Prior Termination Based on Endangerment Grounds

Parental rights also can be terminated for culpable conduct towards another child if the parent has:

- had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) (the two endangerment grounds) or substantially equivalent provisions of the law of another state.<sup>81</sup>

Termination under (M) may be proved by the admission of a copy of the judgment terminating the parent's rights under (D) and/or (E) or substantially equivalent provisions of the law of another State.<sup>82</sup>

## Failure to Support

Failure to support the child is a required element in some of the abandonment grounds discussed above, may be relevant to the issue of best interest, showing a lack of parental interest in, and responsibility for the child and may help support a finding under the endangerment “conditions and surroundings” ground. Failure to support

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<sup>74</sup> Tex. Fam. Code §§ 161.001(1)(D) and (E).

<sup>75</sup> See *Texas Dep't of Human Services v. Boyd*, below, 727 S.W.2d at 533.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Castaneda v. Texas Dep't of Protective and Regulatory Svcs.*, 148 S.W.3d 509, 522 Tex. App. – El Paso 2004, pet. denied).

<sup>79</sup> *In re S.P.*, 168 S.W.3d 197, 204 (Tex.App. – Dallas 2005, no pet.).

<sup>80</sup> *In re K.G.M.*, 171 S.W.3d 502 (Tex. App. – Waco 2005, no pet.).

<sup>81</sup> Tex. Fam. Code § 161.001(1)(M).

<sup>82</sup> *In re J.M.M.*, 80 S.W.3d 232 (Tex. App. – Fort Worth 2002, pet. denied) (a copy of the prior judgment is sufficient proof both of the prior termination and of the basis for that termination of parental rights.)



the child also is a separate termination ground, if termination can be shown to be in the child's best interest. To establish this ground the petitioner must prove that a parent has:

- failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition.<sup>83</sup>

### Failure to Comply with Court Order

There are two termination grounds based on a parent's failure to comply with a court order. Termination may be ordered if the parent has:

- contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261.<sup>84</sup>
- failed to comply with a court order that specifically established the actions necessary for the parent to obtain the return of a child who has been in the temporary or permanent managing conservatorship of TPRS for not less than nine months.<sup>85</sup> The subchapter referenced in the (I) ground permits a court to order a parent (1) to allow access to the child's home for purposes of investigation;<sup>86</sup> (2) to provide medical or mental health records or submit to an examination;<sup>87</sup> or (3) not to remove the child from the state pending completion of the investigation.<sup>88</sup> Given the limited scope of this ground, it is seldom used. To qualify as an order that will support termination of parental rights under the (O) ground for failure of the parent to comply, the order must have "specifically established the actions necessary for the parent to obtain the return of a child" and the child must have been in the custody of the Department for not less than nine months. Disobedience of an order that does not specify "actions necessary for the parent to obtain the return of a child" may be grounds for contempt, but not for termination. Prior orders that establish the actions required of the parent to obtain return of the child may be marked and offered into evidence, but must be redacted to delete any extraneous fact-findings.<sup>89</sup>

### Voluntary Relinquishment

Voluntary relinquishment of parental rights is undoubtedly the most commonly used termination ground in private termination cases. Relinquishment is also frequently used in cases involving the Department. This ground is met if a parent has:

- executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter.<sup>90</sup>

Detailed formal requirements for an affidavit of relinquishment are set out in the Family Code at § 161.103 — and there are some notable differences between relinquishments in a private setting, and those in which the Department is involved. Note that while an affidavit of relinquishment may be revocable in a private case, § 161.103(e) provides that the relinquishment in an affidavit that designates the Department or a licensed child-placing agency as managing conservator is irrevocable. Issues of misrepresentation, fraud, duress, coercion and overreaching have become more common in direct appeals and petitions for equitable bills of review attacking termination orders based upon relinquishments. Relinquishments in cases involving the Department are particularly vulnerable to such challenges, especially when the parent who relinquishes parental rights is

<sup>83</sup> Tex. Fam. Code § 161.001(1)(F).

<sup>84</sup> *Id.* § 161.001(1)(I).

<sup>85</sup> *Id.* § 161.001(1)(O).

<sup>86</sup> *Id.* § 261.303(b).

<sup>87</sup> *Id.* § 261.305.

<sup>88</sup> *Id.* § 261.306.

<sup>89</sup> *In re M.S.*, 115 S.W.3d 534, 538 (Tex. 2003) (admitting the orders as evidence that the parent failed to comply was not in itself inappropriate, but the trial judge's factual findings that his order had, in fact, been violated, should have been redacted, so that the jury could draw its own conclusions).

<sup>90</sup> Tex. Fam. Code § 161.001(1)(K).



unrepresented and/or unsophisticated. Practical and ethical concerns arise when a caseworker or an attorney representing the Department explains the meaning of the affidavit of relinquishment to an adverse party; therefore, best practice dictates that parents be encouraged to obtain *independent* legal advice before signing an affidavit.

### Parent's Bad Acts Directed Towards Another Child

Most termination grounds focus on a parent's acts or omissions that directly harm or endanger the child that is the subject of the termination suit. However, two termination grounds base termination on a prior bad act by the parent with respect to any child. In addition, "bad acts" involving other children may be critical evidence in showing endangerment to the particular child in a (D) and (E) suit; two examples are annotated here.

Parental rights can be terminated if the parent has been found criminally responsible for the death or serious injury of a child under one of the following Penal Code sections, or has been adjudicated under Title 3 (Juvenile Justice Code) for conduct that caused the death or serious injury of a child under one of the following Penal Code sections:

- § 19.02 (murder);
- § 19.03 (capital murder);
- § 19.04 (manslaughter);
- § 21.11 (indecent with a child);
- § 22.01 (assault);
- § 22.011 (sexual assault);
- § 22.02 (aggravated assault);
- § 22.021 (aggravated sexual assault);
- § 22.04 (injury to a child, elderly individual, or disabled individual);
- § 22.041 (abandoning or endangering child);
- § 25.02 (prohibited sexual conduct);
- § 43.25 (sexual performance by a child);
- § 43.26 (possession or promotion of child pornography); and
- § 21.02 (continuous sexual abuse of young child or children) (eff. 9/1/2007). TFC § 161.001(1)(L).

The conviction or adjudication required under (L) may be for acts or omissions directed at any child, whether or not that child is related to the parent or to the child who is the subject of the termination suit. This ground can be used when the child who is the subject of the suit was the victim of the crime; however, such cases also can be handled under the endangerment grounds of (D) and (E). Although termination under (L) occurs most commonly for acts committed against a child, this ground also is used where a parent has injured a child by omission, *i.e.*, where the parent has failed to protect the child from serious injuries inflicted by the other parent. *See, e.g., Segovia*, below.

The Amarillo Court of Appeals has held that unless death or serious injury is an element of the offense, proof of criminal adjudication for one of the crimes listed in (L) is not, in and of itself, sufficient to support termination under that ground.<sup>91</sup> In *Vidaurri* the court opined that the "premise that serious injury must automatically be inferred from the mere commission of indecency with a child fails to survive reasonable analysis".<sup>92</sup>

<sup>91</sup> See *Vidaurri v. Ensey*, 58 S.W.3d 142, (Tex.App.-Amarillo 2001).

<sup>92</sup> *Id.* at 146. *But see In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) (Texas Supreme Court denied the parents' petitions for review, but specifically "disavow[ed] any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury").

## Drug and Alcohol Use

Rights may be terminated if the parent has:

- used a controlled substance as defined by Chapter 481 of the Health and Safety Code *in a manner that endangered the health or safety of the child*, and:
  - i. failed to complete a court-ordered substance abuse treatment program; or
  - ii. after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.<sup>93</sup>

Parental rights also can be terminated if the parent has:

- been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Texas Family Code § 261.001.<sup>94</sup>

A child “born addicted” is defined as a child who is born to a mother who during the pregnancy used a controlled substance as defined by Chapter 481 of the Health and Safety Code, other than a controlled substance legally obtained by prescription, or alcohol, and:

- 1) experienced observable withdrawal from the alcohol or controlled substance;
- 2) exhibited observable harmful effects in the child’s physical appearance or functioning; or
- 3) exhibited the demonstrable presence of alcohol or a controlled substance in the child’s bodily fluids.<sup>95</sup>

Note that the parent’s use of a controlled substance must endanger the child under the (P) ground; while the mere “demonstrable presence” of drugs or alcohol makes the child “born addicted” under (R). Note also that since the definition of a controlled substance under Chapter 481 of the Health and Safety Code explicitly *excludes* alcohol, tobacco, prescribed drugs, and over-the-counter medications, the use of alcohol is relevant to the child-born-addicted ground (R), but would not suffice to terminate rights under (P).

## Imprisonment

Under Texas Family Code § 161.001(1)(Q), a parent’s parental rights may be terminated if a parent has knowingly engaged in criminal conduct that has resulted in the parent’s:

- i. conviction of an offense; and
- ii. confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.

Until 2003, the courts of appeals were split as to whether (Q) should be applied prospectively or retrospectively. In July of 2003, the Texas Supreme Court ruled that (Q) was to be applied prospectively.<sup>96</sup>

## Murder, Attempted Murder, or Solicitation of Murder of the Other Parent of the Child

Parental rights may be terminated if the parent has been convicted of:

- i. the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of

<sup>93</sup> Tex. Fam. Code § 161.001(1)(P) (emphasis added).

<sup>94</sup> *Id.* § 161.001(1)(R).

<sup>95</sup> *Id.* § 261.001(7).

<sup>96</sup> *In re A.V.*, 113 S.W.3d 355 (Tex. 2003) ((Q) “aims to remedy the conditions of abused and neglected children, not to enhance the punishment of the parent”; (Q) applied prospectively from date petition filed; prospective reading “allows the State to act in anticipation of a parent’s abandonment of the child and not just in response to it”).

Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;

- ii. criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i); or
- iii. criminal solicitation under Section 15.03, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i).<sup>97</sup>

House Resolution 193 (79th Legislature, 1st Called Session, 2005) explains the source of this legislation as follows: “Donna Hoedt of Angleton lost her life on April 2, 1996, at the age of 33, when she was murdered by her spouse; even though her husband was subsequently convicted of the crime and sentenced to life in prison, he retained parental rights over the couple’s four children.” The grandmother of the children succeeded in terminating the killer’s parental rights after “a lengthy and expensive court battle,” and has been promoting legislation on the issue. The one case has affirmed termination on this ground.<sup>98</sup> In 2009, the 81st Texas Legislature passed legislation which amended Texas Family Code §161.001(1) (T) to include conviction for attempted murder or solicitation of murder of the other parent of the child.

### **Inability to Care for Child Due To Mental or Emotional Illness**

The trial court may order termination of parental rights in a suit filed by the Department if the court finds that:

- the parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional and mental needs of the child;
- in all reasonable probability, proved by clear and convincing evidence, the illness or deficiency will continue to render the parent unable to provide for the child’s needs until the 18th birthday of the child;
- the Department has been the temporary or sole managing conservator of the child for six months preceding the date of the termination hearing;
- the Department has made reasonable efforts to return the child to the parent; and
- termination is in the best interest of the child.<sup>99</sup>

Immediately after the filing of a suit under this section, the court must appoint an attorney ad litem for the parent and the ad litem must represent the parent for the duration of the suit.<sup>100</sup> A hearing on the termination may not be held earlier than 180 days after the date on which the suit was filed.<sup>101</sup> This ground has been used to terminate a parent’s parental rights where the parent has a persistent mental disability. The mental disability can be the result of either the parent’s mental illness or mental retardation. Texas Family Code section 161.003 does not require culpable conduct. The emphasis is on the best interest of the child; however, the statute does require that the Department use reasonable efforts to return the child to the parent.

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<sup>97</sup> Tex. Fam. Code § 161.001(1)(T).

<sup>98</sup> *In re E.M.N.*, 221 S.W.3d 815 (Tex. App. – Fort Worth April 5, 2007, no pet.) (mother’s rights terminated under (T) for murdering child’s father). See also *In re B.R.*, 950 S.W.2d 113 (Tex. App. – El Paso 1997, no writ) (father’s shotgun slaying of child’s mother constitutes endangerment and there is no need to prove adverse effect on child).

<sup>99</sup> Tex. Fam. Code § 161.003.

<sup>100</sup> *Id.* § 161.003(b), (d).

<sup>101</sup> *Id.* § 161.003(c).

## Critical Issues After Final Order

### Fifteen-day Deadline for Points for Appeal and Motion for New Trial

In termination cases initiated by DFPS, a party who intends to request a new trial must file a request for a new trial with the trial court within 15 days after the termination order is signed.<sup>102</sup> A party who intends to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal within 15 days after the termination order is signed.<sup>103</sup> It is permissible for the statement of points to be combined with a motion for new trial.<sup>104</sup> The trial court may extend the 15-day deadline by up to 15 additional days for good cause. A showing of good cause requires (1) the failure to file timely was not intentional or the result of conscious indifference but the result of accident or mistake, and (2) allowing the late filing will not cause undue delay or otherwise injure the opposing party.<sup>105</sup>

The appellate court may not consider any issue that was not specifically presented to the trial court in a timely-filed statement of the points on appeal or in a statement combined with a motion for new trial.<sup>106</sup>

### Notice of Appeal Deadline

All cases in which the final order is rendered under Chapter 263, including cases in which termination is denied, are subject to the rules for accelerated appeals.<sup>107</sup> Under these rules, a notice of appeal must be filed within 20 days after the final order is signed.<sup>108</sup> The appellate court may grant an extension of time to file the notice of appeal if the notice and a motion to extend are filed within 15 days after the deadline.<sup>109</sup> Filing a motion for new trial does not extend this deadline.<sup>110</sup>

### Required Proof of Indigence on Appeal

A parent represented by appointed counsel at trial is not automatically entitled to a free record and representation on appeal. The Rules of Appellate Procedure and the Family Code require that the appellant file a separate affidavit of indigence and establish indigency for appeal.<sup>111</sup> The trial court is required to review the affidavit and make a ruling on the party's claim of indigence within 35 days after the final judgment is signed.<sup>112</sup>

### Required Post-judgment Hearing by Trial Court

In addition to the indigence question, the trial court is required to review any motion for new trial or points on appeal to determine whether a new trial should be granted and whether the proposed appeal would be frivolous.<sup>113</sup>

### Consequences of Non-compliance

If no party files a timely notice of appeal, the appellate court is without jurisdiction to consider the appeal.<sup>114</sup> Failure of the appellant to file an affidavit of indigence does not prevent the trial court from appointing counsel

<sup>102</sup> *Id.* § 263.405(b).

<sup>103</sup> *Id.* § 263.405(b); e.g., *In Interest of N.L.H.*, S.W.3d, No. 07-07-0313-CV (Tex. App. – Amarillo 2007, subsequent appeal at *In the Interest of N.L.H.*, 2008 Tex. App. LEXIS 1330 (Tex. App. Amarillo, Feb. 21, 2008)) (in absence of statement of points, mother's motion for new trial preserved issues for appeal); *In re K.C.B.*, 240 S.W.3d 454, 455 (Tex. App. – Amarillo 2007), rev'd on other grounds, 251 S.W.3d 514 (Tex. 2008) (court of appeals could not consider statement of points filed before trial court rendered final order); see *In re J.S.*, 219 S.W.3d 623, 625-628 (Tex. App. – Dallas 2007, pet. denied) (§ 263.405(b) creates trap for unwary, and trial courts should alert parent to appeal provisions of § 263.405 in statement in capital letters and bold print at end of judgment)].

<sup>104</sup> Tex. Fam. Code § 263.405(b-1).

<sup>105</sup> *In re M.N.*, 262 S.W.3d 799, 802-804 (Tex. 2008) (counsel's mis-calendar of deadline was good cause for 5-day extension under Tex. R. Civ. P. 5).

<sup>106</sup> Tex. Fam. Code § 263.405(c).

<sup>107</sup> *Id.* § 263.405(a).

<sup>108</sup> Tex. R. App. P.26.1(b).

<sup>109</sup> *In re B.G.*, 104 S.W.3d 565, (Tex. App. – Waco 2002, no pet.) (Where parent attempting to appeal filed notice of appeal 27 days after the judgment was signed, a motion for extension could be implied; ignorance of the new appellate deadline was "reasonable explanation" for the late filing). *In the Interest of T.W.*, 89 S.W.3d 641 (Tex. App. – Amarillo, Aug 08, 2002) (Court of Appeals was without jurisdiction to hear mother's accelerated appeal filed beyond the 15 day deadline for a motion to extend; attorney's ignorance not "good cause" that would waive jurisdictional deadline).

<sup>110</sup> Tex. Fam. Code § 263.405(c). *In re K.A.F.*, No. 04-0493, 160 S.W.3d 923 (Tex. 2005).

<sup>111</sup> Tex. R. App. P. 20; Tex. Fam. Code § 263.405(c)

<sup>112</sup> Tex. Fam. Code § 263.405(e)

<sup>113</sup> Tex. Fam. Code § 263.405(d)

<sup>114</sup> *In re J.A.G.*, 92 S.W.3d 539 (Tex.App.-Amarillo 2002, no pet.).

for appeal.<sup>115</sup> Appointment of appellate counsel is mandatory if the appellant complies with the statutory requirements.<sup>116</sup> On the other hand, failure of an appellant to file the required “statement of points” for appeal does not affect the appeal.<sup>117</sup> But see Texas Family Code § 263.405(i): “The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.” The constitutionality of the restrictions on appeal has been questioned by several courts.<sup>118</sup>

### 90 day period to file suit after final order

Under Texas Family Code § 102.003, several individuals are granted standing to file an original SAPCR.<sup>119</sup> Texas Family Code section 102.006 places limitations on who has standing to file a SAPCR once parental rights have been terminated, and subsection (c) exempts certain individuals from the limitation on standing for 90 days after the termination to allow filing an original petition or a modification. Consequently, an adult sibling, grand parent, aunt or uncle is not limited by 102.006 if they file the original petition or modification within 90 days of the termination order.

### Preserving Error for Appellate Review

In general, as a prerequisite to presenting a complaint on appeal, the record must show that the complaint was preserved in the trial court.<sup>120</sup> To preserve the error for review, the complaint must have been made to the trial court by timely request, objection or motion that stated the grounds for the ruling that the complaining party sought from the court with sufficient specificity to make the trial court aware of the complaint, unless the grounds were apparent from the context. Additionally, the appellant must have complied with the applicable rules of evidence and procedure, and the trial court must have ruled on the request, objection, or motion (either expressly or impliedly), or refused to rule and the complaining party objected to the refusal.

It is well established that a motion in *limine* does not preserve error.<sup>121</sup> A motion in *limine* merely precludes reference to certain issues without first obtaining a ruling, on the admissibility of those issues, outside the presence of a jury.<sup>122</sup> A trial court’s ruling on a motion in *limine* does not preserve error on alleged inadmissible evidence.<sup>123</sup> The grant or denial of a motion in *limine* has no bearing on the ultimate admissibility of the evidence and is never reversible error.<sup>124</sup>

There are four ways to preserve a challenge to the **legal** sufficiency of evidence:

- 1) a motion for instructed verdict,
- 2) an objection to the submission of a jury question,
- 3) a motion for judgment notwithstanding the verdict, or
- 4) a motion for new trial.

To preserve a challenge to the **factual** sufficiency of the evidence, a motion for new trial must be made at the trial court.

<sup>115</sup> *In re M.G.D. and B.L.D.*, 108 S.W.3d 508, No. 14-02-00583-CV, 2003 WL 21229832 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

<sup>116</sup> *In re H.R.*, 87 S.W. 3d 691 (No. 04-01-00737-CV) (Tex.App.-San Antonio, 2002 no pet.).

<sup>117</sup> *In re D.R.L.M.*, 84 S.W.3d 281 (NO. 2-01-323-CV) (Tex.App.-Fort Worth, Jul 03, 2002, pet. denied).

<sup>118</sup> *Interest of J.O.A., T.J.A.M., & C.T.M.*, No. 07-07-0042-CV, 262 S.W. 3d (Tex. App. – Amarillo, 2008, no pet. hist.) (Tex. Fam. Code 405(i) unconstitutional as applied).

<sup>119</sup> Tex. Fam. Code § 102.003.

<sup>120</sup> Tex. R. App. P. 33.1.

<sup>121</sup> *Richmond Condo. v. Skipworth Commercial Plumbing, Inc.*, 245 S.W.3d 646, 665 (Tex. App. – Fort Worth 2008, pet. filed); *Kaufman v. Comm’n for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex. App. – Corpus Christi 2006, pet. denied) cert. denied, 128 S.Ct. 331 (2007); *Greenberg Taurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 91 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App. – Austin 2002, no pet.); *Turner v. Peril*, 50 S.W.3d 742, 745 (Tex. App. – Dallas 2001, pet. denied).

<sup>122</sup> *In Interest of R.V., Jr.*, 977 S.W.2d 777 (Tex. App. – Fort Worth 1998).

<sup>123</sup> *Id.*

<sup>124</sup> *Castaneda v. Tex. Dep’t of Protective & Regulatory Servs.*, 148 S.W.3d 509 (Tex. App. El Paso 2004, pet. denied).

If the appellant takes none of these actions, the appellant waives legal and factual sufficiency issues on appeal.<sup>125</sup>

However, in a nonjury case, a legal or factual insufficiency challenge, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact, may be made for the first time on appeal in the complaining party's brief.<sup>126</sup> Some appellate courts may review factual sufficiency challenges in parental termination cases, despite the party's failure to preserve error, if the parent's counsel unjustifiably failed to preserve error.<sup>127</sup> However, the lenience has not been extended to legal sufficiency challenges. With regard to legal sufficiency challenges, the failure to preserve error may constitute ineffective assistance of counsel, if the parent proves that counsel's performance fell below an objective standard of reasonableness.<sup>128</sup> It is presumed that the counsel's conduct falls within the wide range of reasonableness, including the possibility that counsel's decision not to challenge factual sufficiency was based on strategy or on his professional opinion that the evidence was sufficient.<sup>129</sup> If it is shown that the attorney's performance fell below an objective standard of reasonableness, then the court of appeals must determine whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. If the court of appeals finds that (1) the evidence to support termination was factually insufficient, and (2) counsel's failure to preserve a factual sufficiency complaint was unjustified and fell below being objectively reasonable, then it must hold that counsel's failure to preserve the factual sufficiency complaint constituted ineffective assistance.<sup>130</sup> In that case, the court of appeals should reverse the trial court's judgment and remand the case for a new trial.<sup>131</sup>

Additionally, some courts of appeals will allow review of unpreserved factual sufficiency complaints on the "core issues" in a termination case. The core issues in a termination case are: (1) whether one of the statutory grounds for termination in Family Code § 161.001(1) is met; and (2) whether termination of the parent-child relationship is in the child's best interest.<sup>132</sup>

To preserve error in the jury charge, counsel must either object to the error or submit a request, depending on the type of error complained of. If it is an error of commission (something is included in the charge that is wrong), counsel must object to the specific problem and distinctly point out the grounds.<sup>133</sup> To preserve complaints of error in broad-form submission of jury questions, counsel must object at trial that multiple submission of statutory grounds, parents, or children is not feasible.<sup>134</sup> Generally, the law of preservation of error does not permit, and due process does not require, a court of appeals to review an unpreserved complaint of charge error in **termination** cases.<sup>135</sup> However, in reviewing the appellate court's handling of a termination case, the Texas Supreme Court assumed, without deciding, that a complaint about the omission of the child's best interest from a jury charge could be raised for the first time on appeal.<sup>136</sup>

The Family Code provides, in an appeal arising from a termination suit filed by DFPS, the appellate court may not consider any issue that was not specifically presented to the trial court in a timely-filed statement of the points on appeal or in a statement combined with a motion for new trial.<sup>137</sup> A claim that the decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.<sup>138</sup> However, appellate courts are split on the issue of whether an appellate court may consider a complaint that trial counsel was ineffective by failing to file a statement of points for appeal. Some hold that an ineffective assistance of counsel claim, even one based on failure to file a timely statement of points, must be

125 *In re I.V.*, 61 S.W.3d 789, 794 (Tex. App. – Corpus Christi 2001, no pet.); *In Interest of J.M.S.*, 43 S.W.3d 60, 62 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

126 Tex. R. App. P. 33.1(d).

127 *In Interest of J.P.B.*, 180 S.W.3d 570, 574 (Tex. 2005).

128 *In re M.S.*, 115 S.W.3d 534, 546-550 (Tex. 2003); *In the Interest of J.P.B.*, 180 S.W.3d 570, 574 (Tex. 2005); *In re D.J.J.*, 178 S.W.3d 424, 426-432 (Tex. App. – Fort Worth 2005, no pet.) (attorney's failure to preserve legal and factual sufficiency claims for appellate review constituted ineffective assistance because there was legally insufficient evidence to support any of DFPS's grounds for termination); *In re M.S.*, 140 S.W.3d 430, 432-436 (Tex. App. – Beaumont 2004, no pet.) (attorney's failure to preserve factual sufficiency issue for appellate review did not constitute ineffective assistance because evidence was factually sufficient to support termination).

129 *Id.*

130 *Id.*

131 *Id.*

132 *In re J.F.C.*, 57 S.W.3d 66, 71-72 (Tex. App. – Waco 2001), rev'd on other grounds, 96 S.W.3d 256 (Tex. 2002); *In re A.P.*, 42 S.W.3d 248, 254-256 (Tex. App. – Waco 2001, no pet.).

133 Tex. R. Civ. P. 274.

134 *Id.* 274, 277, 278.

135 *In re B.L.D.*, 113 S.W.3d 340, 348-355 (Tex. 2003); *In re K.N.R.*, 113 S.W.3d 365, 366 (Tex. 2003); *In re A.F.*, 113 S.W.3d 363, 364 (Tex. 2003); *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003).

136 *In Interest of J.F.C.*, 96 S.W.3d 256, 272-273 (Tex. 2002); see also *In Interest of J.F.C.*, 96 S.W.3d 256, 287-295 (Tex. 2002) (Hankinson, J., dissenting, to effect that Texas' common-law doctrine of fundamental error permits appellate court to review unpreserved charge error in termination cases).

137 Tex. Fam. Code § 263.405(i).

138 *Id.*



preserved in a statement of points.<sup>139</sup> Conversely, the Houston First Court of Appeals has held that a person whose parental rights have been terminated in a DFPS action may raise for the first time on appeal a claim of ineffective assistance for counsel's failure to file a statement of points on appeal.<sup>140</sup>

### Time Limits for Direct or Collateral Attack on Judgment

The validity of an order terminating parental rights is not subject to collateral or direct attack after the sixth month after the order was signed if the person whose rights were terminated either:<sup>141</sup>

- 1) Has been personally served;
- 2) Was served with citation by publication, notwithstanding Texas Rules of Civil Procedure 329;<sup>142</sup>
- 3) Has executed an affidavit of relinquishment of parental rights;<sup>143</sup>
- 4) Has executed an affidavit of waiver of interest in a child;<sup>144</sup> or
- 5) Whose rights have been terminated under Section 161.002(b) (Termination of Rights of an Alleged Biological Father):
  - a) Was an alleged father who did not register with the paternity registry, the child was over one year of age when the petition for termination was filed, and after the exercise of due diligence by the petitioner:
    - i) the man's identity and location are unknown, or
    - ii) his identity is known but he cannot be located;<sup>145</sup>
  - b) Was an alleged father who did not register with the paternity registry, and the child was under one year of age when the petition for termination was filed;<sup>146</sup> or
  - c) Was an alleged father who did register with the paternity registry, and the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner was unsuccessful, despite the petitioner's due diligence.<sup>147</sup>

A direct or collateral attack on a termination order based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to the issues relating to fraud, duress, or coercion in the execution of the affidavit.<sup>148</sup>

A party to a termination order may seek a bill of review within the six-month time frame, but if a bill of review is denied, the appeal of that denial is not an accelerated appeal.<sup>149</sup>

The sixth month time limit is not jurisdictional, and may be waived.<sup>150</sup> The Beaumont Court of Appeals held the statutory six-month time limit for attacking a termination order is not jurisdictional, but rather is in the nature of

139 See e.g., *In re R.M.*, \_\_\_ S.W.3d \_\_\_, No. 04-07-00048-CV (Tex. App. – San Antonio 2007, pet. denied); *In re R.C.*, 243 S.W.3d 674, 676-677 (Tex. App. – Amarillo 2007, no pet.); *In re R.M.R.*, 218 S.W.3d 863, 864 (Tex. App. – Corpus Christi 2007, no pet.).

140 *Bermea v. Tex. Dep't of Family & Protective Servs.*, 265 S.W.3d 34, No. 01-07-00699-CV (Tex. App.-Houston [1st Dist.] 2008, pet. denied); *Doe v. Brazoria County Child Protective Servs.*, 226 S.W.3d 563, 576 (Tex. App. – Houston [1st Dist.] 2007, no pet.).

141 Tex. Fam. Code §§ 161.211(a)–(b); *But see In re T.R.R.*, 986 S.W.2d 31, 35 (Tex. App. – Corpus Christi 1998, no pet.) (explaining that § 161.211(a) & (b) do not apply to suits filed before September 1, 1997).

142 Tex. Fam. Code § 161.211(b).

143 *Id.* § 161.211(a) & (c); see e.g., *In re C.R.P.*, 192 S.W.3d 823, 825-826 (Tex. App. – Fort Worth 2006, no pet.).

144 *Id.* § 161.211(a) & (c).

145 *Id.* § 161.002(b)(2).

146 *Id.* § 161.002(b)(3).

147 *Id.* § 161.002(b)(4).

148 *Id.* § 161.211(c).

149 *In re L.N.M.*, 182 S.W.3d 470, 473-474 (Tex. App. – Dallas 2006, no pet.).

150 See *In re Bullock*, 146 S.W.3d 783, 787-791 (Tex. App. – Beaumont 2004, no pet.).



an affirmative defense that may be waived if not raised. The case involved a bill of review, filed by a man claiming to be a child's biological father, attacking a two-year-old default judgment terminating his parental rights. The trial court found the termination order void, and the mother appealed, arguing that the bill of review was time-barred under Family Code § 161.211. The Court of Appeals held that the mother waived her right to assert the affirmative defense of limitation by failing to raise it in response to the father's bill of review.<sup>151</sup>

### **Trial Court may not Suspend Judgment**

Generally the court is allowed to suspend the operation of a judgment being appealed, but there is an exception for termination orders in cases brought by DFPS.<sup>152</sup> The court may not suspend the operation of an order or judgment terminating the parent-child relationship in a suit brought by the state or a political subdivision of the state.<sup>153</sup>

### **Protecting Identity in the Appellate Opinion**

**Family Code.** The Family Code provides, on motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by initials only.<sup>154</sup> The purpose of the rule is to protect the privacy of minors in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights. Section 109.002(d) of the Family Code authorizes appellate courts, in their discretion, to identify parties only by fictitious names or by initials. Similarly, Section 56.01(j) of the Family Code prohibits identification of a minor or a minor's family in an appellate opinion related to juvenile court proceedings. However, these provisions are often not necessary.

**Texas Rules of Appellate Procedure.** Effective September 2008, all documents filed in parental-rights termination cases or juvenile court cases, except for the docketing statement and appellate record, must use alias names.<sup>155, 156</sup> Any fictitious name should not be pejorative or suggest the person's true identity. This rule has applies to a broader range of documents than the Family Code provisions, which only apply to the appellate opinion. However, the rule is more limited than the Family Code in the types of cases it applies to. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases. For instance, a SAPCR that is not a termination case would not be protected under Rule 9.8 of the Rules of Appellate Procedure, but the judge could use the Family Code provision to protect identities in the opinion. Although appellate courts are authorized to enforce the rule's provisions requiring redaction, parties and amici curiae are responsible for ensuring that briefs and other papers submitted to the court fully comply with the rule.

**» PRACTICE TIP :** In preparing your appeal, make sure you comply with this rule by using the appropriate alias names.

<sup>151</sup> *Id.*

<sup>152</sup> Tex. Fam. Code § 109.001.

<sup>153</sup> *Id.* §§ 109.001(d), 109.002(c).

<sup>154</sup> *Id.* § 109.002(d).

<sup>155</sup> Tex. R. App. P. 9.8.

<sup>156</sup> Rule 9.8 was enacted because appellate briefs are widely available through electronic media sources, and the appellate courts' effort to protect the identity by disguising their names in the opinion did little good where briefs and other court papers with the child's name were available to the public.



Federal law and several U.S. and Texas Supreme Court cases establish the underpinnings of legal representation of children who are the subject of lawsuits filed by DFPS. The Texas Legislature decided, in response to the *Sims* case discussed in this manual's introduction, to require that each child in a child protective services case have both an appointed attorney and an appointed guardian. Texas also invented the “dual role” for an attorney to serve both as the child's lawyer and as the child's “best interest” representative. The dual role presents obvious dangers of a conflict between the “best interest” of the child and the “expressed interests” of the child client. The existence of a separate guardian role helps minimize the potential for conflicts, or complaints of conflict.

Chapter 107 of the Texas Family Code provides guidance for court appointed representatives in child protective services cases, including attorneys for parents, attorneys for children, and guardians *ad litem* for children. An attorney *ad litem* (AAL) is defined as “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.”<sup>1</sup> It is noteworthy that this definition applies to all court appointed attorneys, including attorneys for parents, but commonly the term “attorney *ad litem*” refers to the attorney appointed to represent a child in a DFPS case. Additionally, the statute proceeds to give detailed instructions to attorneys for children, but makes no further mention of specific duties for parents' attorneys. Unless there is a conflict, the court may appoint a single attorney to represent all children in the case and may appoint one attorney to represent both parents.

**» PRACTICE TIP :** In cases involving two or more siblings, attorneys must carefully analyze whether the siblings have a conflict of interest and need separate counsel. For example, a conflict of interest may arise where one child reports physical or sexual abuse but a sibling says the report is false; where there is physical or sexual abuse between siblings; where one sibling wants to return to the parents' home but another sibling believes the home is unsafe; where one sibling does not want another sibling to be separately adopted, etc.

Although federal law does not mandate legal representation for children, the Child Abuse Prevention and Treatment Act (CAPTA) requires appointment of a guardian *ad litem* for children who are subject to child protection proceedings. CAPTA does not require that the representative be an attorney, however, several states have interpreted CAPTA to require legal representation for children. Furthermore, recent amendments to federal law enhance the requirement and mandate that the representative must be adequately trained.

Recognizing that legal representation of a child, particularly a child victim of abuse or neglect, presents challenges unknown to the representation of adult-clients, the Texas Family Code requires an attorney *ad litem* for the child to “become familiar with the American Bar Association's Standards of Practice for Attorneys who Represent Children in Abuse and Neglect Cases,”<sup>2</sup> the suggested amendments to those standards adopted by the National

<sup>1</sup> Tex. Fam. Code § 107.001(2).

<sup>2</sup> Attorneys handling child abuse cases must review the American Bar Association Standards of Practices for Lawyers who Represent Children in Abuse and Neglect Cases (ABA Standards), which have been in effect since February 1996, and may be found and downloaded at: [http://www.abanet.org/family/reports/standards\\_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf)

Association of Counsel for Children<sup>3</sup>, and the American Bar Association's Standards of Practice for Attorneys who Represent Children in Custody Cases" as appropriate to the "nature" of the appointment.<sup>4</sup>

### Lawyers, Laymen and Children under Texas Law

Chapter 107, Family Code, now provides for: (1) a *lawyer* to represent the child in the traditional attorney-client manner; (2) a *guardian* to represent the child's best interests, even if the child might disagree, and to testify about the facts of the case; (3) a *dual role* attorney who is required to fulfill both roles, but cannot testify; and (4), in private cases only, an *amicus* attorney who functions as a lawyer, but does not represent the child.

Powers and duties of the various representatives are set out in four separate sections of Chapter 107. The statute makes it clear that a *non-attorney* guardian, in addition to other specified rights and duties, *must* be permitted to testify.<sup>5</sup> Lawyers representing children or serving as an "amicus" attorneys also have specified powers and duties, *including the right to participate in the conduct of the litigation to the same extent as an attorney for a party*.<sup>6</sup> Additional duties are separately set out for the attorney ad litem for the child and for the amicus attorney.<sup>7</sup> The statute makes it clear that lawyers are subject to disciplinary action by the State Bar if they fail to adhere to their ethical duties.<sup>8</sup> Because lawyers are subject to the Texas Disciplinary Rules of Professional Conduct, lawyers are prohibited from testifying in court or submitting a report, except as permitted by the disciplinary rules.<sup>9</sup>

### Scope and Duration of Appointment

The appointment of an attorney ad litem or guardian ad litem for a child in a CPS case continues for any period set by the court.<sup>10</sup> The duty of a child's attorney to "participate in the conduct of the litigation to the same extent as an attorney for a party," specifically includes filing an answer, petitions, motions, responses or objections as necessary to represent the child. The American Bar Association (ABA) standards for representing children in child abuse and neglect cases suggest several "petitions, motions, responses or objections" that may be filed "as necessary to represent the child."<sup>11</sup> Examples include motions for mental or physical examination of a party or the child; for parenting, custody or visitation evaluation; to increase, decrease, or terminate contact or visitation; for orders relating to a change of placement (prohibiting or requiring the change); for contempt for non-compliance with a court order; to order specific services for the child or family; to protect the child's confidentiality or property; to dismiss the suit; petitions for termination of the parent-child relationship; to establish or refute parentage; or to establish child support.

The attorney also shall "take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; and encourage settlement and the use of alternative forms of dispute resolution."<sup>12</sup>

### Expanding or Modifying Scope of Representation

The ABA Standards place a specific duty on the child's attorney to seek authority from the court to "pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment."<sup>13</sup> Fortunately, since the appointment as attorney ad litem in Texas includes the right to "participate in the conduct of the litigation to the same extent as an attorney for a party," all issues reasonably included in the scope of the Suit Affecting the Parent Child Relationship (SAPCR) may be addressed through pleadings or motions.<sup>14</sup> Thus, an attorney ad litem in Texas automatically has authority to pursue many of the collateral issues

3 Suggested amendments to the ABA Standards, promulgated by the National Association of Counsel for Children, adopted by the NACC in April, 1999 and promulgated as a proposed revised version of the ABA Standards, may be found and downloaded at: <http://naccchildlaw.yourmembership.com/?page=PracticeStandards#>

4 Attorneys appointed for children in private custody cases should review the "custody cases" standards, adopted by the American Bar Association in August 2003, which may be found and downloaded at: [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf). The child custody standards are interesting as background information, but do not by their terms apply to abuse and neglect cases. Tex. Fam. Code § 107.004(a)(3).

5 *Id.* § 107.002(e).

6 *Id.* § 107.003(1)(F).

7 *Id.* §§ 107.004 & 107.005.

8 *Id.* § 107.0045.

9 *Id.* § 107.007(a).

10 *Id.* § 107.016.

11 ABA Standard C-3

12 Tex. Fam. Code §§ 107.003(1)(G), (H).

13 ABA Standard D-12

14 See Tex. Fam. Code § 107.003(1)(F).

listed in the ABA Standard, including child support, custody, paternity, termination of parental rights and, if the appointment is not limited by the court to the time period before a final termination order, adoption of the child. If, however, the attorney needs to seek relief not available in the SAPCR court, such as a probate guardianship, federal benefits, defense of the child in juvenile court from criminal or other charges, a personal injury suit, or defense of the child in an involuntary commitment proceeding through the mental health system, a separate appointment with specific reference to the collateral proceeding will be necessary. The court has broad authority to limit the duration of the appointment, but not the scope of the appointment with respect to specific SAPCR issues.<sup>15</sup>

## Attorney ad Litem, Guardian ad Litem and Special Advocates, Dual Role and Amicus Attorney

### Attorney ad Litem

In a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child, the court is required to appoint an attorney ad litem and a guardian ad litem for the child, immediately after the filing of the suit and before the full adversary hearing.<sup>16</sup>

An attorney ad litem for a child is an advocate for the child, and must “represent the child’s expressed objectives of representation and follow the child’s expressed objectives of representation during the course of litigation if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem.”<sup>17</sup>

An attorney appointed as a guardian ad litem in a case in which the child has an attorney ad litem is prohibited from functioning as an attorney, but may take actions that might be taken by a non-attorney guardian, including testifying in the case.<sup>18</sup> Although a child may have both an attorney and a guardian ad litem in a suit filed by DFPS, if the parents cannot pay fees and expenses, the county is only required to pay the attorney, not the guardian.<sup>19</sup> Thus, every child in a Texas CPS case has two distinct advocates or an attorney with both the guardian and the attorney roles.

“Attorney ad litem” means (1) an attorney, (2) who provides legal services to a person, including a child, and (3) who owes that client the duties of undivided loyalty, confidentiality, and competent representation.<sup>20</sup> This definition applies to an attorney ad litem for a child, for an incapacitated person or for an indigent adult parent of the child. The ABA Standards state that a child’s attorney “owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult.”<sup>21</sup>

The specified “powers and duties” in Chapter 107 discussed below apply only to attorneys appointed for children; parents’ attorneys are expected to represent the parents as they would any other adult client.

The attorney ad litem appointed for a child in a CPS case must complete three hours of continuing legal education in child advocacy or have experience determined by the court to be equivalent to that training.<sup>22</sup> This provision is consistent with a growing national consensus, reinforced to some extent by federal law, that minimum standards of training for child advocates in the protective services system are essential.

An attorney ad litem for a child “is entitled to:” (A) request clarification from the court if the role of the attorney is ambiguous; (B) request a hearing or trial on the merits; (C) consent or refuse to consent to an interview of the child by another attorney; (D) receive a copy of each pleading or other paper filed with the court; (E) receive notice of each hearing in the suit; (F) participate in any case staffing concerning the child conducted by an authorized

<sup>15</sup> *Id.* § 107.016.

<sup>16</sup> Tex. Fam. Code §§ 107.012, 107.011(a).

<sup>17</sup> *Id.* § 107.004(a)(2).

<sup>18</sup> *Id.* § 107.011(d).

<sup>19</sup> *Id.* § 107.015(c).

<sup>20</sup> *Id.* § 107.001(2).

<sup>21</sup> See ABA Standard A-1.

<sup>22</sup> Tex. Fam. Code § 107.004(b).

agency; and (G) attend all legal proceedings in the suit.<sup>23</sup> The attorney “shall” participate in the conduct of the litigation to the same extent as an attorney for a party, and take any action consistent with the child’s interests that the attorney considers necessary to expedite the proceedings.<sup>24</sup>

An attorney for a child is also required to “seek to elicit in a developmentally appropriate manner the child’s expressed objectives of representation.”<sup>25</sup> The attorney shall, in a developmentally appropriate manner, advise the child.<sup>26</sup> The advisor role is recognized as a general duty to clients by Texas Disciplinary Rule of Professional Conduct 2.01 and by the ABA Standards.<sup>27</sup>

If the child is competent to, and has formed an attorney-client relationship with the attorney, it is the lawyer’s duty to follow the child’s expressed objectives of representation throughout the course of the litigation.<sup>28</sup> There is some dispute between the NACC and the ABA on how to resolve differences between the appointed lawyer and the child.<sup>29</sup> The NACC version rejects “robotic allegiance” to the child’s directives. Both versions, however, require that the attorney, whenever possible, honor the child’s expressed objectives of representation.

The attorney must also “consider the impact on the child in formulating the attorney ad litem’s presentation of the child’s expressed objectives of representation to the court.”<sup>30</sup> That is, as with any client, it is the lawyer’s role to make the best possible presentation of the child’s position, while minimizing potential harm to the client.

### Guardian ad Litem

A “guardian ad litem” or GAL is a person (not functioning as a lawyer unless serving in the “dual role”) who is “appointed to represent the best interests of a child.”<sup>31</sup> An attorney may be appointed in the “dual role” of guardian and attorney ad litem only in a “suit filed by a governmental entity.”<sup>32</sup>

“Guardian ad litem” means a person appointed *to represent the best interests of a child*. The term includes: (A) a volunteer advocate appointed under Subchapter C; (B) a professional, *other than an attorney*, who holds a relevant professional license and whose training relates to the determination of a child’s best interests; (C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or (D) an attorney ad litem appointed to serve in the dual role.<sup>33</sup> Note that this definition appears to exclude the appointment of an attorney *acting in the role of an attorney* as a guardian ad litem. However, there is nothing in the language that would make possession of a bar card conclusive proof that the holder lacks the “competence, training, and expertise” sufficient to represent the best interest of the child as a guardian ad litem.

The court may appoint a volunteer advocate or other adult to serve as guardian ad litem.<sup>34</sup> The court may also appoint a court appointed special advocate (CASA)<sup>35</sup> as a “volunteer advocate,” and not as guardian ad litem for the child.<sup>36</sup> In that event, however, the court must appoint another person as guardian ad litem or leave the attorney in the dual role, since the child is entitled to both. CASA is not entitled to fees, even if appointed as guardian ad litem in a private case.<sup>37</sup>

The Family Code does not specify a minimum training requirement for the GAL, but it should be noted that National CASA has adopted mandatory *Standards for Local CASA/GAL Programs* (CASA Standards).<sup>38</sup> Those

<sup>23</sup> *Id.* §107.003(3).

<sup>24</sup> *Id.* § 107.003(1), (F), (G).

<sup>25</sup> *Id.* § 107.003(1) (B) .

<sup>26</sup> *Id.* § 107.004(a)(1).

<sup>27</sup> See ABA Standard B-4.

<sup>28</sup> Tex. Fam. Code § 107.004(a)(2).

<sup>29</sup> See ABA Standard B-4 and the NACC Version relating to “Client preferences.”

<sup>30</sup> Tex. Fam. Code § 107.003(1)(C).

<sup>31</sup> *Id.* § 107.001(5).

<sup>32</sup> *Id.* § 107.001(4).

<sup>33</sup> *Id.* § 107.001(5).

<sup>34</sup> *Id.* § 107.011(b).

<sup>35</sup> For more information regarding CASA programs in Texas, please see [www.texascasa.org](http://www.texascasa.org)

<sup>36</sup> *Id.* § 107.031(a).

<sup>37</sup> *Id.* § 107.031(b).

<sup>38</sup> *Standards for Local CASA/GAL Programs*, (2006 Edition) (Approved by the National CASA Association Board of Directors March, 1997; revisions approved September 2002 & April 2006. [http://www.casenet.org/program-management/standards/0605\\_standards\\_for\\_local\\_programs\\_0053.pdf](http://www.casenet.org/program-management/standards/0605_standards_for_local_programs_0053.pdf)



standards require that every CASA volunteer receive a minimum of 30 hours of specific pre-service training, including training on the applicable law, court procedures, family dynamics and child development, as well as at least 12 hours of in-service training each year. Many local CASA programs go beyond these minimum standards in training their volunteers, particularly if serving as GAL in the local courts.

A guardian ad litem may “conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child” in the particular case.<sup>39</sup> The guardian ad litem “shall” interview the child and others, including the foster parents and parties.<sup>40</sup> Note that unless the guardian is an attorney, the disciplinary rules do not restrict his communication with others in the case.

The guardian must elicit the child’s “expressed objectives,” but is not bound by the child’s objectives.<sup>41</sup>

A guardian ad litem is entitled to: (1) receive a copy of each pleading or other paper filed with the court in the case in which the guardian ad litem is appointed; (2) receive notice of each hearing in the case; (3) participate in case staffings by an authorized agency concerning the child; (4) attend all legal proceedings in the case, but may not call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed in the dual role; (5) review and sign, or decline to sign, an agreed order affecting the child; and (6) explain the basis for the guardian ad litem’s opposition to the agreed order if the guardian ad litem does not agree to the terms of a proposed order.<sup>42</sup>

A guardian ad litem may be compelled to attend any hearing and testify.<sup>43</sup> The court must “ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify **and** submit a report regarding the guardian ad litem’s recommendations regarding: (1) the best interests of the child; and (2) the basis for the guardian ad litem’s recommendations.”<sup>44</sup>

The guardian ad litem may submit a written report, but if he does so, the report must be provided to the parties not later than the date directed by the court in a scheduling order or 10 days prior to trial in a contested case.<sup>45</sup> A report to the court by a guardian ad litem is *not* automatically admissible for review by a jury, but it may be offered and introduced into evidence if permitted by the Texas Rules of Evidence. That is, it may be proved up as a business record, and the party opposing introduction would have to attack the report on hearsay or other grounds to keep it out of evidence.<sup>46</sup>

In a jury trial, the guardian ad litem *may* need to be listed as a witness in response to a proper discovery request, since the statute specifies that in “a *nonjury trial*, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian’s report without the guardian ad litem being listed as a witness by a party.”<sup>47</sup> The same subsection provides that the guardian ad litem must be permitted to testify in the narrative if no party calls him as a witness. The drafting leaves some ambiguity with respect to whether a guardian ad litem may insist on testifying before the court in a *jury trial* as well as in a non-jury trial. Arguably, the provision mentioned above that a court “shall ensure” that a non-attorney guardian ad litem “has an opportunity to testify” concerning the best interests of the child and the guardian ad litem’s reasons for any recommendations, places all parties on notice that the guardian is a witness and trumps the exclusionary rules under the Rules of Civil Procedure. Of course the safer course is for any attorney that might want the evidence to always list the guardian ad litem as a witness in response to proper discovery requests.

The provisions relating to the duties and powers of a guardian ad litem *do not* automatically apply to an attorney in the “dual role.” See the discussion below. An attorney may serve *solely* as a guardian ad litem in a CPS case — for example, as a CASA volunteer, but in such a case would be prohibited from functioning as an attorney in the

39 Tex. Fam. Code § 107.002(a)(1).

40 *Id.* § 107.002(b)(1).

41 *Id.* § 107.002(b)(2), (3).

42 *Id.* § 107.002(c).

43 *Id.* § 107.002(d).

44 *Id.* § 107.002(e).

45 *Id.* § 107.002(g).

46 *Id.* § 107.002(h).

47 *Id.* § 107.002(f).



case by performing legal services, engaging in discovery other than as a witness, arguing the case or examining other witnesses.<sup>48</sup>

If a child cannot meaningfully formulate objectives of representation, the guardian ad litem must be consulted concerning the child's best interests and the attorney must ensure that the guardian ad litem's opinion and basis for any recommendation are presented to the court.<sup>49</sup>

### Dual Role Attorney

The court may appoint the same person in a dual role to serve as both attorney and guardian ad litem.<sup>50</sup> Unless a guardian ad litem is also appointed, an attorney appointed to represent the child in a suit by a governmental entity is presumed to be serving in the dual role.<sup>51</sup>

"Dual role" means the role of (1) *an attorney* who is (2) *appointed* under Section 107.0125 to act as (3) *both guardian ad litem and attorney ad litem* for a child in a suit filed by a governmental entity.<sup>52</sup> Just as an amicus attorney cannot be appointed in a child protective services case, an attorney may not serve in the "dual role" in a private custody case.<sup>53</sup>

The dual role attorney has all the duties, powers and responsibilities assigned to the child's guardian ad litem, except the duty to make reports or testify. As an attorney ad litem, the dual role attorney is specifically prohibited from submitting a report into evidence or testifying except as permitted by the Disciplinary Rules.<sup>54</sup> Thus, the dual role attorney must determine and represent the "best interests of the child" as well as seek to elicit and represent the child's expressed objectives of representation.<sup>55</sup>

An attorney appointed in a child protective services case is presumed to be appointed in the dual role unless a separate guardian is appointed.<sup>56</sup>

### Removal from Dual Role

An attorney appointed in the dual role may request the court to appoint another person to act as guardian ad litem for the child; if the request is granted the attorney thereafter serves as attorney ad litem only.<sup>57</sup> The court on its own motion may at any time appoint a guardian ad litem and restrict the attorney to acting as attorney for the child.<sup>58</sup> Although these provisions do not mandate that the attorney request, or the trial court grant a motion to withdraw from the GAL role, it should be noted that ethical guidance provided by the American Bar Association and the National Association of Counsel for Children (NACC) both require that the attorney/guardian, after counseling with the child, *shall* request the appointment of a guardian ad litem if the child's choices are deemed by the attorney to be "seriously injurious," and shall thereafter vigorously represent the child's expressed objectives of representation.<sup>59</sup>

#### Amicus Attorney ad Litem and GAL in Private Cases ONLY

An "amicus attorney" may be appointed *only* in a suit *other* than a "suit filed by a governmental entity," **"to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child."**<sup>60</sup> In other words, in a *private* custody case the court may have a "best interests" attorney who is not bound by the child's expressed objectives of

<sup>48</sup> *Id.* § 107.011(d).

<sup>49</sup> *Id.* § 107.008(c).

<sup>50</sup> *Id.* § 107.0125(a).

<sup>51</sup> *Id.* § 107.0125(d).

<sup>52</sup> *Id.* § 107.001(4).

<sup>53</sup> *Id.* § 107.022(1).

<sup>54</sup> *Id.* § 107.007(a).

<sup>55</sup> *Id.* §§ 107.002(b), 107.004(a)(2).

<sup>56</sup> *Id.* § 107.0125(d).

<sup>57</sup> *Id.* § 107.0125(c).

<sup>58</sup> *Id.* § 107.0125(b).

<sup>59</sup> See ABA Standard B-4(4) (NACC version).

<sup>60</sup> Tex. Fam. Code § 107.001(1).

representation.<sup>61</sup> Since the amicus attorney does not represent the child and can never be appointed in an abuse or neglect case, she is not required to “become familiar” with the ABA or the NACC standards of practice for attorneys in abuse and neglect cases, but is required to become familiar with the ABA Standards of Practice for Attorneys who Represent Children in Custody Cases.<sup>62</sup>

In the unlikely event that a private custody case turns into a CPS case by DFPS intervening and seeking termination of one or both parents or to be named as managing conservator of the child, the amicus attorney should withdraw and an attorney ad litem or “dual role” attorney should be appointed. The presence of an amicus attorney does not alter the *mandatory duty* of the court to appoint representatives for the children. In other words, in a Child Protective Services suit there must be an attorney (and guardian) ad litem for the child, not simply an attorney for the court. Chapter 107 does not allow for blended CPS and private cases. The court is expressly prohibited from appointing an *amicus attorney* in a suit filed by a governmental entity.<sup>63</sup> Although the express prohibition against appointing an amicus attorney in a suit *filed* by a governmental entity would arguably not apply if the appointment already exists before DFPS intervenes, continuing the amicus appointment would certainly confuse the issues and exponentially complicate the litigation.

### Substituted Judgment of Attorney for Child

An attorney ad litem appointed to represent a child or an attorney appointed in the dual role may determine that the child cannot meaningfully formulate the child’s objectives of representation in a case because the child “lacks sufficient maturity to understand and form an attorney-client relationship” with the attorney.<sup>64</sup> Thus, if an attorney determines that a client is mature enough to understand and form an attorney-client relationship; substituting judgment under Section 107.008 would not be available. Substituted judgment derives in part from the ABA Standards “to the extent that a child cannot express a preference, the child’s attorney shall make a good faith effort to determine the child’s wishes and advocate accordingly, or request appointment of a guardian ad litem.”<sup>65</sup> The NACC standards take a broader view of the attorney’s right to determine how to handle an immature child and provide that “[w]hile the default position for attorneys representing children under these standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made. In such cases, the attorney may rely upon a substituted judgment process (similar to the role played by an attorney guardian ad litem), or call for the appointment of a guardian ad litem, depending upon the particular circumstances, as provided herein.”<sup>66</sup>

An attorney may also substitute judgment if the attorney determines the child cannot meaningfully formulate objectives of representation because despite appropriate legal counseling, the child continues to express objectives of representation that would be seriously injurious to the child.”<sup>67</sup> Both the ABA Standards and the NACC version restrict an attorney’s authority to overrule a child. “If the child’s attorney determines that the child’s expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer’s opinion of what would be in the child’s interests), the lawyer shall, after unsuccessful use of the attorney’s counseling role, request appointment of a separate guardian ad litem and continue to represent the child’s expressed preference, unless the child’s position is prohibited by law or without any factual foundation. The child’s attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child’s position.”<sup>68</sup> As noted above, substituted judgment should be used with great caution, since taking actions contrary to the expressed decisions of a client may violate various provisions of the Texas Disciplinary Rules of Professional Conduct.

<sup>61</sup> *Id.* § 107.005(a).

<sup>62</sup> *Id.* § 107.005(b)(4).

<sup>63</sup> *Id.* § 107.017.

<sup>64</sup> *Id.* § 107.008(a)(1).

<sup>65</sup> ABA Standard B-4 (1).

<sup>66</sup> NACC Version B-4 (1).

<sup>67</sup> Tex. Fam. Code § 107.008(a)(2).

<sup>68</sup> ABA Standard B-4(4) (strikeout and underline shows NACC proposal).

The broadest “substituted judgment” provision in Chapter 107 and one that has caused some concern among child advocates is that the attorney may determine that the child cannot meaningfully formulate the child’s objectives of representation because for some reason the child is incapable of making reasonable judgments and engaging in meaningful communication. Once this determination is made, an attorney may present a position that the attorney determines will serve the best interests of the child.<sup>69</sup> This language appears to derive at least in part from the NACC proposal for Standard B-4 (2), which suggests that the attorney may “rely upon a substituted judgment process” when the child is “very young or for some other reason is incapable of judgment and meaningful communication.”

An attorney ad litem or attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child’s expressed objectives of representation (1) shall, if a guardian ad litem has been appointed for the child, consult with the guardian ad litem and, without being bound by the guardian ad litem’s opinion or recommendation, (2) ensure that the guardian ad litem’s opinion and basis for any recommendation regarding the best interests of the child are presented to the court; and (3) may present to the court a position that the attorney determines will serve the best interests of the child.<sup>70</sup>

If no guardian ad litem has been appointed, “an attorney ad litem or an attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child’s expressed objectives of representation” may present to the court a position that the attorney determines will serve the best interests of the child.<sup>71</sup>

The ABA Standards and the NACC proposed revisions are not in agreement on how to handle the situation in which a child does not agree to actions that appear to be in the child’s best interests. “Child’s interests” in the ABA Standards equates to the child’s “expressed preferences,” which the child’s attorney is bound to follow throughout the course of the litigation.<sup>72</sup> Advocating for the child’s best interests is purely the job of the guardian ad litem, who must consider, but is not bound by the child’s “expressed preferences.”<sup>73</sup> In this situation, the guardian ad litem does not direct the lawyer’s representation of the child; the lawyer continues to be bound by the child’s expressed preference.<sup>74</sup>

The National Association of Counsel for Children disagreed with the formulation of the duties set out in ABA standard B-4, and adopted proposed revisions to the 1996 standards on April 21, 1999. The proposed revisions eliminated the duty of the child’s lawyer to make a good faith effort to determine the child’s wishes and advocate accordingly, in favor of a somewhat more complicated approach heavily dependent upon use of the counseling function (advisor role) of the child’s attorney, and a more expansive approach to substituted judgment.

“To the extent that a child cannot meaningfully participate in the formulation of the client’s position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child’s and formulate and present a position which serves the child’s interests. Such formulation must be accomplished through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to:

- a. Determine the child’s circumstances through a full and efficient investigation;
- b. Assess the child at the moment of the determination;
- c. Examine each option in light of the two child welfare paradigms; psychological parent and family network; and
- d. Utilize medical, mental health, educational, social work and other experts.”<sup>75</sup>

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<sup>69</sup> Tex. Fam. Code § 107.008(a)(3).

<sup>70</sup> *Id.* § 107.008(c).

<sup>71</sup> *Id.* § 107.008(b).

<sup>72</sup> See ABA Standard B-4.

<sup>73</sup> See ABA Standard A-2.

<sup>74</sup> See ABA Standard B-4(3).

<sup>75</sup> ABA Standards (NACC Revised Version) B-4(2).

It should be noted that although these “objective criteria” were adopted by the NACC in April of 1999, they have not been accepted by the ABA, nor have they been adopted by statute or court rule in any jurisdiction.

No matter which standards the attorney may find more attractive or understandable, it would be dangerous to forget that by definition the child’s lawyer owes “undivided loyalty” to the child client.<sup>76</sup> Texas Disciplinary Rules of Professional Conduct require, ultimately that a lawyer abide by the client’s decisions.<sup>77</sup> The use of the lawyers “advisor” role, as suggested by the ABA and NACC standards, is also supported by the Disciplinary Rules.<sup>78</sup>

### Advocating against the Guardian ad Litem

What if the child can “direct” the litigation to some extent, but the child’s preferences are deemed by the guardian ad litem as being contrary to the child’s “best interests” in the case? The primary duty of an attorney ad litem for any party, including the child is “undivided loyalty” to that party.<sup>79</sup> The NACC version of the Standards of Practice asserts that “loyalty” does not equate to “robotic allegiance” to the wishes of the child.<sup>80</sup> The NACC’s emphasis on a “mutually arrived upon” legal strategy between the child and the attorney echoes the “advisor” function of an attorney under Texas Disciplinary Rules.<sup>81</sup> Ultimately, however, a lawyer must, in representing a client, abide by that client’s decisions.<sup>82</sup>

Even if a lawyer originally appointed in the dual role must request appointment of a guardian ad litem because the child’s choice would be “seriously injurious” to the child, the ABA Standards require the lawyer to continue representing the child’s “expressed preference” unless that preference is “prohibited by law or without factual foundation.”<sup>83</sup> The NACC standards agree on this point.<sup>84</sup>

### Confidentiality and Privileges

There is *no* privilege or confidentiality provision in Chapter 107 relating to communications between a guardian ad litem and the child. However, some of the information gathered by the guardian ad litem — for example, information relating to the location or names of the foster care providers — may be restricted by other law from disclosure without prior hearing and court order.<sup>85</sup> The Human Resources Code provides a criminal penalty for dissemination of confidential information from records of DFPS without authorization.<sup>86</sup> CASA as an organization also has a confidentiality provision with respect to the organization’s records.<sup>87</sup>

Attorney-client communications and attorney work product are protected, whether the attorney is serving solely as attorney ad litem, in the dual role, or as an amicus attorney.<sup>88</sup> This provision is not restricted to attorneys for children, but would also apply to an attorney for a parent or incapacitated person. Of course, the duty to report child abuse or neglect overrides all other confidentiality provisions.<sup>89</sup>

### Breaking Child Confidences

There is no exception to the duty to report child abuse for attorneys representing child clients.<sup>90</sup> As a professional having “cause to believe” that a child has been or may be abused or neglected, or is a victim of sexual abuse, the attorney ad litem or dual role attorney has a duty to make a report within 48 hours to the child abuse hotline [(800) 252-5400].<sup>91</sup> The duty to report is explicitly applicable to communications that would otherwise be covered

<sup>76</sup> Tex. Fam. Code § 107.001(2).

<sup>77</sup> Tex. Disciplinary R. Prof Conduct 1.02.

<sup>78</sup> Tex. Disciplinary R. Prof Conduct 2.01.

<sup>79</sup> Tex. Fam. Code § 107.001(2).

<sup>80</sup> ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (NACC Revised Version) B-4.

<sup>81</sup> Tex. Disciplinary R. Prof Conduct 2.01.

<sup>82</sup> Tex. Disciplinary R. Prof Conduct 1.02.

<sup>83</sup> ABA Standard B-4(3).

<sup>84</sup> See ABA Standard (NACC Revised Version) B-4(4).

<sup>85</sup> See Tex. Fam. Code § 261.20.

<sup>86</sup> Tex. Hum. Res. Code § 40.005(e).

<sup>87</sup> See Tex. Fam. Code § 264.613.

<sup>88</sup> *Id.* § 107.007(a).

<sup>89</sup> *Id.* § 107.007(b).

<sup>90</sup> *Id.* § 261.101.

<sup>91</sup> *Id.* § 261.101(b).

by the attorney-client privilege.<sup>92</sup> Failure to report is a class B misdemeanor.<sup>93</sup> Although the statute is not explicit on this point, it is generally agreed that the duty does not apply to communications about abuse or neglect that have already been reported (i.e. discussions about the abuse that is the subject of the suit in which the attorney has been appointed, unless they relate new or different abuse, do not have to be shared with DFPS over the child client's objection).

Even if a report has to be made, an attorney does not have the right to reveal the *content* of confidential communications without the child-client's consent except to the minimum extent necessary to make the report. Since the attorney-client privilege can be used to exclude testimony by the lawyer at court about the communications, it should also apply to limit the report.<sup>94</sup> Of course the best option is to convince the child either to authorize the lawyer to reveal the confidences or to report the abuse directly to the caseworker or another adult, but if the child refuses to follow the advice and make the report, the attorney must do so.

If the information is not a new allegation of abuse, but simply confirms the prior abuse and raises questions about the child's "expressed objective of representation," the attorney must maintain the confidentiality and continue to advocate for the child unless "despite appropriate legal counseling" the child continues to express objectives that would be *seriously injurious* to the child.<sup>95</sup> Even then, the ABA Standards would require that the lawyer not simply substitute judgment entirely, but take the minimum steps necessary to ensure the child's safety while supporting the child's direction as much as possible.<sup>96</sup>

### Immunity from civil damages

A guardian ad litem or attorney ad litem is not liable for civil damages arising from "a recommendation made or an opinion given" in the capacity of guardian or attorney ad litem.<sup>97</sup> That subsection does not apply to "an action taken or a recommendation or opinion given" in bad faith, with malice, with conscious indifference or reckless disregard to the safety of another, or "that is grossly negligent or willfully wrongful."<sup>98</sup> Note that the immunity applies only to "recommendations or opinions" but that the exception for bad faith applies also to "actions" taken in the role of guardian ad litem or attorney ad litem. The provision from which this section evolved, former section 107.003, applied only to guardians, and was, apparently, an attempt to codify *Delcourt v. Silverman*.<sup>99</sup> These provisions will not protect an attorney from the State Bar's disciplinary procedures, which are specifically mentioned in Chapter 107.<sup>100</sup>

### How do the Texas Disciplinary Rules of Professional Conduct Apply to a Child's AAL?

Recent revisions to Chapter 107, as discussed above, have reinforced the traditional role of an attorney by defining an attorney ad litem as "an attorney who provides legal services to a person, including a child, *and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation*."<sup>101</sup> Although an attorney appointed under Chapter 107 must "become familiar with" the American Bar Association's Standards of Practice for Attorneys who Represent Children in Abuse and Neglect Cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children and ABA Standards of Practice for Attorneys who Represent Children in Custody Cases, neither the Family Code nor the ABA/NACC standards overrule the lawyer's duty of undivided loyalty, confidentiality and competent representation under the disciplinary rules. Disciplinary Rules mentioned in Chapter 107 are Rules 4.02, 4.03 and 4.04, cited as considerations in the statutory mandate to interview the child, potential witnesses and the parties, and Rule 3.08, cited in support of the prohibition on trial

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<sup>92</sup> *Id.* § 261.101(c).

<sup>93</sup> *Id.* § 261.109.

<sup>94</sup> *Id.* § 261.202.

<sup>95</sup> *Id.* § 107.008(a)(2).

<sup>96</sup> ABA Standard B-4 (3), cmt.

<sup>97</sup> Tex. Fam. Code § 107.009(a).

<sup>98</sup> *Id.* § 107.009(b).

<sup>99</sup> *Delcourt v. Silverman*, 919 S.W.2d 777 (Tex.App. – Houston [14th Dist.] 1996, writ denied).

<sup>100</sup> Tex. Fam. Code § 107.0045.

<sup>101</sup> *Id.* § 107.001(2) (emphasis added).



testimony by attorneys.<sup>102</sup> In the event of a conflict between the “standards” and the disciplinary rules, an attorney must follow the rules, or face the prospect of disciplinary action by the bar.<sup>103</sup>

A lawyer appointed under Chapter 107, Family Code who fails to perform the duties required by Sections 107.003 (powers and Duties of attorney ad litem for Child and Amicus Attorney) and 107.004 (Additional Duties of Attorney ad Litem for Child) is subject to disciplinary action through the State Bar’s grievance process.<sup>104</sup> A few of the Texas Disciplinary Rules of Professional Conduct that should be considered in the context of representing children under Chapter 107 are discussed below. Of course, many other rules could come into play depending on the circumstances of any particular case.

## Generally, what can and what should a child’s attorney ad litem do?

### Attorney Fact Gathering

An attorney ad litem appointed to represent a child must interview the child, if the child is four years of age or older in a “developmentally appropriate” manner.<sup>105</sup>

The attorney must also interview the parents and “each person who has significant knowledge of the child’s history and condition, including any foster parent of the child; and the parties to the suit.”<sup>106</sup> As an attorney, the lawyer must keep in mind Disciplinary Rules 4.02 (communication with one represented by counsel), 4.03 (dealing with unrepresented persons) and 4.04 (respect for rights of third persons).

The attorney must investigate the facts of the case to the extent the attorney considers appropriate.<sup>107</sup> The attorney is required to obtain and review copies of relevant records relating to the child.<sup>108</sup> These records should include:

- Pleadings filed by the Department
- Affidavit of Removal
- Removal court report
- Any other relevant court documents
- Offense reports/criminal records
- Medical, educational, psychological, or other records of client

The appointing court is required to include in the appointment order for the guardian or attorney ad litem authorization for immediate access to the child and any information relating to the child.<sup>109</sup> This access may be restricted by other laws with respect to medical or mental health records.<sup>110</sup>

### Meeting and talking with the client

One of the most important and first things an attorney ad litem must do is meet the client. Communication is the first duty owed to any client. The ABA Standards go on to say that “irrespective of the child’s age, the child’s attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.”<sup>111</sup> This requirement is now in the Family Code. An attorney ad litem must meet before each court hearing with the child, if the child is at least four years of age, or with the child’s caretaker if the child

<sup>102</sup> *Id.* §§ 107.003(1)(A) & 107.007(a)(4).

<sup>103</sup> See *Texas Center for Legal Ethics and Professionalism*, web site at: <http://www.txethics.org/reference.asp> for an on-line version of the Rules and Comments (available for viewing without paying membership fees).

<sup>104</sup> Tex. Fam. Code § 107.0045.

<sup>105</sup> *Id.* § 107.003(1)(A)(i); See also ABA Standard B-4.

<sup>106</sup> *Id.* § 107.003(1) (A) (ii) & (iii); ABA Standard C-2 (4) & (6).

<sup>107</sup> Tex. Fam. Code § 107.003(1)(D); ABA Standard C-2.

<sup>108</sup> Tex. Fam. Code § 107.003(1) (E); ABA Standard C-2 (1), (2).

<sup>109</sup> Tex. Fam. Code § 107.006(a).

<sup>110</sup> *Id.* § 107.006(c).

<sup>111</sup> ABA Standard C-1.

is younger than four.<sup>112</sup> In 2006, the Office of the Attorney General published an opinion that a telephone interview did not meet the definition of the statutory requirement to “meet” the client.<sup>113</sup> In 2007, the 80th Legislature changed the statute by adding subsection (c), which allows an attorney for a child to forgo meeting their client if the court finds at the hearing that the attorney’s compliance with subsection (d) is not feasible or in the best interest of the child.<sup>114</sup>

**» PRACTICE TIP : Meet your client in their placement so you can observe how the child is doing there. The more you visit your client, the better the opportunity to develop trust. If possible, meet and observe your client alone and with siblings or other members of the household.**

The Family Code requires the attorney ad litem to interview their client in a developmentally appropriate manner, if the child is four years of age or older.<sup>115</sup> This language is derived from and should be understood in the context of the ABA Standards. The Standards, in turn, refer to a valuable book on questioning children first published in 1992.<sup>116</sup> The first principle cited by Dr. Walker is that “we do not question children.” That is, each child must be approached as an individual and interviewed with an eye to determining how the child’s experience, culture, as well as age, affect that particular child’s ability to participate in the litigation.

The lawyer is not required to operate alone in attempting to understand the child client. A critical part of representation of a child client is to investigate the child’s history and condition, including interviewing individuals who are familiar with the child, such as the parties or the foster parents. With this background, the attorney should be able to assess the child’s ability to understand the process and the realistic options that may be available in the case. Based on that assessment, the attorney should “present developmentally appropriate” choices in order to seek to elicit the child’s “expressed preferences” for the representation. For example, in a particular case the child may be able to indicate preferences as between available potential caretakers.

The age of a client is important when you are trying to determine whether you believe your client is capable of forming a meaningful relationship with you and whether your client understands the meaning of the attorney-client relationship. To many children in foster care, the attorney ad litem is just one more person who comes around periodically and asks a whole lot of questions. And, again the attorney ad litem is often left with making an assessment of a child’s situation without much input from the child. However, the attorney ad litem should always try to elicit the desires and wishes from every child who is able to communicate. Keep in mind that many children are preverbal or may be impaired and therefore may lack the language acquisition, expression and cognitive development necessary to communicate with their attorney ad litem in a way that enables the attorney ad litem to understand the child and take direction.

As a general rule, the attorney should be aware that even a mature child will likely be much more literal in interpreting language than an adult, and that legal jargon and legal concepts will be even more mysterious to the child than to an adult client. Preschoolers are very literal, do not handle abstractions, have limited vocabularies and often develop idiosyncratic usages of words, have difficulty with pronouns and negatives, especially double negatives, cannot express confusion — almost never will state “I don’t understand,” and will tend to agree with adults, because they expect to be directed by adults. Between ages seven to ten, children are better able to disagree if appropriate, but still have difficulty with abstractions, may be unclear about time concepts and complex or unusual language, such as passive constructions, still generally are unable to give an adult-level narrative of an event, and are easily intimidated, confused or diverted by adults. Even teenagers should not simply be treated like adult clients without exploring actual abilities. Many still have no clear sense of historical time, are unable to

<sup>112</sup> Tex. Fam. Code § 107.004(d).

<sup>113</sup> Op. Tex. Att’y Gen. No. GA-0405 (2006)

<sup>114</sup> *Id.* § 107.004(e).

<sup>115</sup> *Id.* § 107.003(1)(a)(i).

<sup>116</sup> See Anne Graffam Walker, Ph.D., *Handbook on Questioning Children, A Linguistic Perspective*, 2d Edition, ABA Center on Children and the Law, 1999. (Available from the ABA).



formulate or process complex sentences, are confused by unfamiliar language and jargon, and are very unlikely to admit confusion by asking for clarification.

It is essential for effective communication that the lawyer meets with the child where the child is comfortable — in other words, children’s attorneys make house calls. Meeting outside the protection of the attorney’s office makes preservation of the lawyer’s independence from the pressures of other participants in the litigation, such as foster parents, a bit more difficult. It is also essential to keep in mind that the attorney-client privilege can be compromised if others are permitted to be present, at least within ear-shot, when the attorney and child meet. A serious temptation is to meet with sibling groups together; this is a temptation that must be resisted, for a number of reasons. Group meetings may be appropriate to establish rapport, but it is essential that each child be given ample opportunity to be considered as an individual.

One good technique to explain the lawyer’s role is to explain to the child that the child is the “boss” with respect to how to handle the case. It is essential to stick with common and simple words and concepts. The child must be permitted, and encouraged, to talk about anything. Acknowledge the alleged abuse, but do not investigate by asking the child. In general, a positive focus on what can be done in the future is much more productive than dwelling on the past. Do make the judge the center of the case and be very clear that neither you nor any of the other adults in the case make the ultimate decision about what will happen. Enlist the child, is he or she is able and willing to do so, in helping to shape the case. For example: “Why should the judge approve doing [what you want to do]? How would that make things better for you? How could we show the judge it would work out right?” Remind the client that you will help make the best case you can, but you are only the lawyer.

**» PRACTICE TIP :** During the first meeting with a child client, the attorney should explain in age-appropriate terms what the child can expect from the attorney, and the nature of the attorney-client relationship. Counsel should explain attorney-client privilege but also explain that the privilege is not absolute. For example: “Because I’m your lawyer, everything you tell me is private, and I will not tell anyone what we talked about, unless you say I can. But there is one exception. If you tell me someone is abusing you or neglecting you, I have to report it.”

**» PRACTICE TIP :** When interviewing your client, it’s suggested that you do not interrogate the child about the abuse or neglect they may have suffered when you meet the child for the first time or possibly during future meetings, unless the child initiates the conversation. This information should be available to you through court reports, the removal affidavits, or other sources.

**» PRACTICE TIP : Ask your client open ended questions, rather than questions which suggest the answers. Some open ended questions include:**

**Tell me about...**

**What it's like to live here?**

**What was your visit with your mother like?**

**Where would you like to live?**

**Who would you like to live with?**

**What you would like for me to tell the judge?**

An attorney must keep a client reasonably informed about the proceeding.<sup>117</sup> A child, like any client with a disability is entitled to be consulted to the extent possible and to be treated with attention and respect. There is seldom an ideal option available for a child in the child protective services system. Nevertheless, there will be some choices that are more attractive than others — and closer to the best interest of the child. Communication in such circumstances will involve “candid advice” presented “in as acceptable a form as honesty permits” to help the client obtain the best available outcome.<sup>118</sup>

### **Pleadings filed by Attorney Ad Litem for Child**

One of the first things an attorney ad litem should do after being appointed to a case is to file an Answer. The Family Code directs the attorney ad litem to “participate in the conduct of the litigation to the same extent as an attorney for a party.”<sup>119</sup> The attorney ad litem has rights to notice and participation in the process, among them the right to request a hearing or trial on the merits, consent or refuse to an interview of the child by another attorney and attend all legal proceedings.<sup>120</sup> The attorney ad litem need not file an Answer to avoid a default judgment, however, filing an Answer communicates to all parties that the child's representative intends to play a significant role in the SAPCR. In addition to filing an Answer, the attorney ad litem should attend all hearings, call and examine witnesses, make objections and arguments and review and sign all orders.<sup>121</sup>

### **Other Motions**

The child's attorney ad litem may also need to file other motions, such as Motions for Further Temporary Orders, to request visitation, placement, or a particular type of medical or psychological examination, etc.

### **Protecting Children from Court**

Direct testimony from children can be traumatic for the children. The ABA Standards encourage a careful consideration of the issue, and that the attorney be bound by the client's direction.<sup>122</sup> Alternatives to in-court testimony should be explored when appropriate. *Res gestae* and other hearsay exceptions may permit the child's words to be considered without the trauma of in-court confrontation.<sup>123</sup> A statute may make a child abuse victim's statement, taken under specified circumstances, admissible.<sup>124</sup> A court may interview the child in chambers.<sup>125</sup> Caution should be exercised to make sure the child knows that the choice is not binding on the trial judge. A specialized deposition rule can restrict participation in a deposition of the child.<sup>126</sup> Remote televised testimony is

<sup>117</sup> Tex. Disciplinary R. Prof Conduct 1.03.

<sup>118</sup> Tex. Disciplinary R. Prof Conduct 2.01.

<sup>119</sup> Tex. Fam. Code § 107.003.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> ABA Standard D-6.

<sup>123</sup> Tex. R. Ev *Id.* 801.

<sup>124</sup> Tex. Fam. Code §§ 104.006, 104.002.

<sup>125</sup> *Id.* § 153.009.

<sup>126</sup> *Id.* § 104.003.

permitted by rule and now technologically feasible in many courtrooms.<sup>127</sup> No live testimony can be compelled if an alternative under Chapter 104 is available and ordered by the court.<sup>128</sup> The court may, and should if the child's medical condition warrants, order an alternative to live testimony.<sup>129</sup> However, the ABA Standards also emphasize that "in most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify."<sup>130</sup>

## Placement, Services and Visitation

### Client's Placement

Many times children are initially placed in shelters or foster homes when they are removed from their families. Sometimes they are placed with relatives. Lawyers who represent children removed from their homes should argue for appropriate, individualized services in the least restrictive and intrusive, and most family-like environment possible.<sup>131</sup> Federal law requires DFPS to place a child in the least restrictive, most family-like setting available that can meet the child's needs.<sup>132</sup> Federal law also requires that the child must be placed in close proximity to the parents' home (unless proximity presents a risk to the child) and the child's school.<sup>133</sup>

### The Service Level or Level of Care System

A basic understanding of the types of substitute care available and the classification system for children in care is essential to dealing with the CPS placement system. The child's attorney should always keep in mind that the financial incentives are for a caretaker to document the child's need for a higher "level of care," (LOC) and that this generally results in a more restrictive environment for the child. On the other hand, the Department will save money if the child's "level of care" is set lower, or the child can be placed with a free caretaker, such as a relative. The Department's caseworkers are responsible for ensuring that an initial, authorized LOC is obtained when a child comes into care.<sup>134</sup> The caseworker may assign an initial level of care of "basic" without review outside the agency.

If the child requires "moderate" or higher services, the Department will complete a "common application" for the child, which contains information about the child, including a placement history report, a medical/mental history report, an education history report, a current psychological report (within the last 6 months), and a current medical report.<sup>135</sup>

If the child needs a LOC above "basic" the case worker must submit a "common application" with supporting documentation to Youth For Tomorrow (YFT), a not-for-profit agency, located in Arlington, Texas. YFT, after a review of the documentation, assigns the child an authorized LOC and issues an "Initial Service Authorization" that is valid for twelve months if the child is deemed to need "moderate" services, but for only three months if the child is deemed to need "specialized" or "intense" services.

Once YFT assigns a LOC, the child can be placed accordingly. In addition to the automatic review periods mentioned above, the Department or a child-placing agency may request a new assessment from YFT if the child's behavior or other factors seem to have changed dramatically. Documentation includes medical, psychological, school and foster home or facility records of the child's behavior. The review period for determining the current services needed by a child while in placement is the previous 30 days if the child has been in care for more than 30 days. If the Department does not agree with the level of care received, or it is in the child's best interest that the LOC be lowered, a supervisor may lower the level of care one or two levels without prior YFT authorization.<sup>136</sup>

<sup>127</sup> *Id.* § 104.004.

<sup>128</sup> *Id.* § 104.005(a).

<sup>129</sup> *Id.* § 104.005(b).

<sup>130</sup> ABA Standard D-5.

<sup>131</sup> *See America's Children, Still at Risk*, American Bar Ass'n, Steering Cttee. On the Unmet Legal Needs of Children, at 83 (American Bar Association, 2001).

<sup>132</sup> *Social Security Act*, 42 U.S.C. §§622, 627, 675; *CPS Handbook*, Appendix 6311-B.

<sup>133</sup> *Id.*

<sup>134</sup> *CPS Handbook*, Item 6345.

<sup>135</sup> *CPS Handbook*, Items 6345, 6346.

<sup>136</sup> *CPS Handbook*, Item 6346.21.

The four levels of care are determined using the following descriptions:

1. **Basic Services** (formerly LOC 1 and 2 children). Usually care is provided by a foster home. Provides a normal family setting. Appropriate for a child whose needs are not out of the ordinary and who is capable of responding to limit setting or other interventions used in families.
2. **Moderate Services** (formerly LOC 3 and some LOC 4 children). Usually care is provided in a therapeutic or habilitative foster home. Provides a structured, supportive setting; structured daily activities; therapeutic intervention; and access to therapeutic or medical support. Children needing moderate services may engage in frequent non-violent, anti-social acts, occasional physical aggression, and minor self-injurious actions, and/or have difficulties that present a moderate risk of harm to self or others. Children with moderate substance abuse, developmental delays or mental retardation, or moderate medical or habilitative needs require moderate services.
3. **Specialized Services** (remainder of LOC 4 children and LOC 5 children). Care may be provided in a foster home, group home or even a residential treatment center. Caregivers have specialized training to provide therapeutic, habilitative and medical support and interventions. Characteristics of children needing specialized services may include frequent or unpredictable physical aggression, being markedly withdrawn and isolated, major self-injurious actions to include recent suicide attempts, and difficulties that present a significant risk of harm to self or others. Children needing specialized services need 24-hour supervision that includes close monitoring, therapeutic, habilitative and medical intervention and guidance that is regularly scheduled and professionally designed and supervised to help the child attain appropriate functioning.
4. **Intense Services** (formerly LOC 6 services). Usually provided in residential treatment centers, or even hospitals. These placements provide a high degree of structure and limited outside access. The child needing intense services may be extremely aggressive or self-destructive, and his or her behavior may present an imminent, severe danger of harm to self or others. Caregivers have specialized training to provide intense therapeutic and habilitative supports and interventions with limited outside access. Children in this level need 24-hour supervision, including frequent one-to-one supervision, where the child can be seen and heard at all times to ensure the child's safety and sense of security.

### Emergency Shelters and Assessment Homes

Emergency shelters and certain specialized homes take children before a determination has been made on the child's level of care. Some children who come into the Department's care are initially placed in an emergency children's shelter, which are available for placements 24 hours a day, 7 days a week. Shelters are designed to care for a large number of children for a small amount of time, usually less than a month. Shelters are not appropriate for extended stays.<sup>137</sup> The following time limits generally apply:

- 1) if a child is 5 or older, the maximum length of stay is 30 days;
- 2) if the child is between 1 and 5 years of age, the maximum stay is 5 workdays, or 30 days if the child is in the shelter with a sibling who is 5 or older or a parent who is under 18;
- 3) if the child is less than 12 months old, the maximum stay is 4 days (96 hours) unless the infant is in the shelter with a parent who is under 18. In that case, the infant can stay up to 30 days.<sup>138</sup>

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<sup>137</sup> 40 Tex. Admin. Code §700.1322; CPS Handbook Item 6331.

<sup>138</sup> 40 Tex. Admin. Code § 700.1321.

**» PRACTICE TIP :** Counsel for the child should ensure that the issues of placing siblings together and placing children with relatives whenever safe and feasible are addressed as early as possible in the case, and enforce the Department’s legal duty to make prompt and reasonable efforts to keep siblings together and to find and assess relatives for placement. Placing the child in familiar surroundings with familiar people can help minimize the trauma of removal, facilitate contact with extended family members, promote stability, and minimize changes in placement.

Counsel should become familiar with the laws and regulations governing the various funding sources for relative caregivers (including foster care funds, TANF, SSI benefits for children with disabilities, etc.), and help resolve funding issues so as to remove financial barriers for relatives who wish to care for a child.

Also, under the Fostering Connections Act, children have a right to remain in the school they attended at the time of removal, unless it is in the child’s best interests to change schools. If the child changes schools, the Department must immediately enroll the child in the new school and provide the child’s education records to the new school.

### **Evaluating Needs and Obtaining Services for Your Client**

Although lawyers are accustomed to operating in an adversarial atmosphere, CPS cases exist in a realm where an adversarial nature may in the long run fail to benefit your child client. Showing respect and requesting a service for your client goes a lot further than demanding or threatening court action to obtain the service.

Beyond a child’s basic needs (food, clothing, and shelter) there are behavioral and educational needs that must be met as well. The availability of services depends, of course, on what providers exist in the community where the child resides. Each child in the conservatorship of the state automatically qualifies for Medicaid. Most medical and dental care is covered by Medicaid. It also covers mental health, substance abuse counseling and rehabilitation, and Early Childhood Intervention programs that offer speech, occupational, and physical therapies for children.

The ABA Standards require the child’s lawyer to “seek appropriate services” for the child and family that are consistent with the child’s wishes.<sup>139</sup> For a child with special needs, those services should “address the physical, mental, or developmental disabilities” of the child.<sup>140</sup> Some services are available through the child protection agency itself, either directly or through its contracts with local service providers.

<sup>139</sup> ABA Standard C-4.

<sup>140</sup> ABA Standard C-5.

**» PRACTICE TIP :** Counsel for children should make ongoing inquiries to ensure that their clients' basic needs are met. Does the child have access to healthy and appealing food? Does the child have a quiet and comfortable place to sleep, and does he or she have trouble sleeping? Does the child have appropriate space and materials to play, exercise, do homework, etc.? Counsel should also seek to identify special needs, including educational and developmental issues, chronic health conditions, emotional and behavioral issues, etc. and advocate for services to meet those needs with the Department and through the court, if necessary. If it appears that a child may have unidentified special needs, it is important to obtain an assessment by a qualified expert. Counsel for children should also ask clients about their interests and activities. Sports, music, arts, and other social and recreational activities can be crucial to a child's well-being and healthy development. Children should not be denied access to normal childhood experiences because they are in foster care.

### Special Immigrant Juvenile Status

A child in the custody of the state who is not a citizen or lawful permanent resident of the United States is in a very precarious position. Being in state custody for abuse or neglect provides no special protection against deportation. The situation is even more difficult for children in the long-term care of the state. If a child's immigration status is not properly addressed before he emancipates from state custody, he will have a very difficult time establishing residency in this country, will not be eligible for most government benefits, and will not be authorized to work. Fortunately, however, there is a way out. Under federal law, undocumented children in the child welfare system can obtain legal residency through the Special Immigrant Juvenile Status (SIJS) process if they meet certain criteria. The criteria include: (1) the child is in the custody of the state; (2) reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment or a similar basis found under state law; (3) return to the child's home country is not in his best interests;<sup>141</sup> (4) the child is under the age of 21 at the time the SIJS petition is filed;<sup>142</sup> and (5) the child is still under court supervision at the time the SIJS petition is granted.<sup>143</sup> The Department's legal division is a resource for Special Immigrant Juvenile Status (SIJS).<sup>144</sup>

Given the benefits an SIJS can confer on a child, attorneys for both the child and the parents should try to identify children who may be eligible and ensure that the Department initiates the SIJS process as soon as possible. To initiate the SIJS process, it is important to note that a child is now eligible if reunification is ruled out for just one parent.<sup>145</sup> Previously, eligibility was predicated on the child being in the long-term care of the state.<sup>146</sup> In other words, under new federal law enacted in 2008 and implemented in March 2009, it appears that if a child has been effectively abandoned by a father, the child will still be eligible for SIJS, even if the case is in the temporary managing conservatorship

<sup>141</sup> 8 U.S.C. §1101(a)(27)(J)

<sup>142</sup> 8 CFR §204.11(c)(1).

<sup>143</sup> 8 CFR §204.11(c)(5).

<sup>144</sup> See also CPS Handbook Item 6585.

<sup>145</sup> Based on changes contained in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

<sup>146</sup> Congress amended special immigrant juvenile status in 1997 to define more restrictively the minors to whom the status was available by codifying that such children have to be found dependent upon a state juvenile court "on account of abuse, neglect or abandonment." (8 U.S.C. § 1101(a)(27)(J)(i)). The congressional record reflects that Congress amended the law to curb abuse of the special immigrant juvenile status provisions, and "to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused *children*..." (H.R. Rep. No. 105-405, at 130 (1997) (*emphasis added*)). Congress sought to ensure that "neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect." (*Id.*)



phase and the goal is return to the mother, assuming that the child meets all the other eligibility criteria.

Attorneys for the child should also take special note that a child can apply for SIJS until the age of 21 and that the child must be under the supervision of the court when the petition is granted. As a result, for eligible youth who turn 18 and have not had an application filed or who have not had a previously filed application granted, the attorney should advise the youth to request an extension of court jurisdiction until the SIJS application is filed and granted.<sup>147</sup>

**» PRACTICE TIP :** If the child was not born in the United States, counsel should be aware of potential immigration issues, and of the child’s potential eligibility for Special Immigrant Juvenile Status. Counsel should determine whether the client wishes to remain in the United States or return to his or her country of origin, and discuss with the client the potential immigration consequences of various placement and permanent plan options.

### Visitation with Parents and Siblings

Restricting visitation by a parent in a CPS case is common for obvious reasons arising from the abuse or neglect that lead to CPS involvement. However, as an attorney ad litem, it is very important to not let the Department’s desire to punish or test the parent’s commitment to a child come at the child’s expense. Visitation is very difficult to manage and is usually infrequent — perhaps only one hour per week under strictly supervised conditions. For a child in a foster home or a shelter, this visit is the only way to retain ties with their family. Children seek assurance that their parents’ love continues even though they no longer live with the parents. Children need to also know that their parents are alright. For an infant or a toddler, the visitation is the only bonding experience they will have.

The attorney ad litem should seek to normalize these visits and increase their frequency when appropriate either through agreement of the parties or by seeking a court order. Infants need short, frequent visits. CASA volunteers or GALs may be able to transport or supervise a visit. Be sure to explore this possibility if visitation becomes difficult to schedule.

Of course, a parent who fails to visit presents a different problem. As the attorney ad litem, you may be left to explain to a child why a parent did not come to a visit. It is devastating for a child to wait for a week to see his mom, then mom fails to show up. The parent’s failure to show up may not diminish the child’s desire to see the parent, however, over time, it can affect the child in a very negative way and the attorney ad litem and the caseworker must be mindful of further exposing the child to disappointment by attempting visitation week after week. As an attorney ad litem observing a visitation, it is important to note the interaction between the parent and child or children.

<sup>147</sup> Tex. Fam. Code §263.602



**» PRACTICE TIP : Observe interaction between the parent and child, child and siblings, and siblings and parent and note:**

- Affection
- Discipline
- Entertainment
- Joy
- Tears and why
- Stress
- Anxiety
- Inappropriate topics of discussion

A court may, in a pending suit to terminate the parent-child relationship, render an order denying a parent access to a child if the parent is indicted for criminal activity that constitutes a ground for terminating the parent-child relationship under Texas Family Code §161.001. The denial of this access shall continue until the date the criminal charges for which the parent was indicted are resolved and the court renders an order providing for access to the child by the parent.<sup>148</sup>

One very important relationship that is often overlooked in CPS cases is the sibling relationship. Siblings should be placed together if possible and if safe to do so.

**» PRACTICE TIP : Counsel for children placed apart from siblings should carefully examine the Department's justification for such placement. Siblings should be separated only if necessary for their own safety or well-being. Counsel should be alert to instances where siblings are separated merely because of the difficulty of finding a placement for all siblings together, or because one sibling is considered more adoptable than another, or because of normal sibling conflict that does not create a serious safety risk.**

In 2009, the 81st Texas Legislature enacted legislation to make it easier for siblings to maintain contact once involved in the foster care system. Texas Family Code §153.551 allows a sibling of a child who is separated from the child because of an action taken by the Department to request access to a child by an original SAPCR or a modification of a SAPCR. This section was amended to allow a sibling to request access in an original SAPCR without regard to whether the appointment of a managing conservator is an issue in the suit.<sup>149</sup> The court shall order reasonable access to the child by the child's sibling if the court finds that access is in the best interest of the child.<sup>150</sup> Texas Family Code §156.002(c) allows a sibling of a child who is separated from the child because of the actions of the Department to file a suit for modification of a SAPCR requesting access to the child in the court with continuing, exclusive jurisdiction.

### Working with the Department

When the child-client is placed in temporary foster care, working with the child protection agency becomes an essential part of the attorney's advocacy. Identifying services to meet a client's needs and pushing the bureaucracy to provide those services promptly may also be a frustrating experience for the child's lawyer. To

<sup>148</sup> Tex. Fam. Code § 161.201(c).

<sup>149</sup> Tex. Fam. Code §153.551(B).

<sup>150</sup> *Id.* §153.551(c).

lawyers unaccustomed to dealing with a large bureaucracy, the Department may seem like a labyrinth, with internal rules and unstated agendas that appear to impede help to a child in its care. That labyrinth may be negotiated better, however, if the lawyer acknowledges the agency's internal culture and learns to use that culture for the benefit of the client.

Recognizing the cultural gap between the professions of law and social work may diminish frustration and improve the lawyer's effectiveness on behalf of the client. Among many other contrasts, the two professions reflect very different communication styles. The professional training of social workers encourages compromise, mediation and cooperation. Thus, they are often uncomfortable with the confrontational aspects of the adversary process and the assertiveness of lawyers. Perhaps to overstate the difference, lawyers confront and challenge; social workers share and empathize. Confronting a caseworker may yield a response that expresses the social worker's irritation with the lawyer or the legal system, rather than the action sought by the confrontational lawyer. One useful technique is to approach the social worker in the same manner as approaching another party in mediation, identifying common interests, such as the duty of all parties to seek the best outcome for your child client, and couching the request in terms of those interests. For example, rather than confronting the caseworker with the fact that your client child rejects the Department's proposed outcome and you will fight it in court, you might want to convey the same information (the child's serious opposition) as a problem that will need to be dealt with in order to make the ultimate placement stable and permanent. This is a goal DFPS should share.

Maintaining regular contact with a caseworker helps the lawyer to stay up-to-date on the needs of the client and on case developments. Regular communication with the caseworker also provides an opportunity to advocate on the child's behalf with one of the most significant decision-makers in the child's life. On the other hand, if a caseworker is reluctant or recalcitrant, knowledge of the Department's responsibilities to the client, as detailed in the CPS Handbook, may help move the caseworker to do his or her job. If those steps fail, contacting the caseworker's supervisor can be useful in dealing with difficult caseworkers.

One of the first things CPS will do once a child is taken into care is prepare a Family Plan of Service and develop a permanency plan for the child. The Service plan should be prepared in consultation with the child's parents, and must meet certain statutory requirements set out in Texas Family Code Sections 263.101, 263.102, 263.103.

The Child's Attorney can use the Service Plan as a tool to advocate for their clients. The Service Plan creates an outline of responsibilities of the Department and the parents and creates a useful framework to hold CPS accountable for making services available. Service plans can be amended at anytime.<sup>151</sup> Therefore, the plan does not have the force of contract, but the court may enforce or change it.

**» PRACTICE TIP : Children in foster care often need special education services. Children's counsel should become familiar with the educational rights provided by the federal Individuals with Disabilities Education Act [IDEA].<sup>152</sup> Counsel should ask clients and caregivers how they are doing in school, review school records, and if problems arise, ensure that the client has an up-to-date and effective Individualized Education Plan [IEP]. Counsel should also ensure that students with IEPs are not suspended, expelled or otherwise disciplined for conduct that is a result of their disabilities. If special-education issues arise that are beyond the scope of counsel's expertise, counsel should consult with or refer the client to an attorney specializing in education law.**

<sup>151</sup> Tex. Fam. Code § 263.104 (a).

<sup>152</sup> 20 U.S.C. § 1400 *et seq.*

**Also, older foster children may have experienced multiple school changes, and may need help and advocacy in gathering school records, obtaining proper credit for partial school years, determining what requirements they must complete to graduate from high school, and developing a plan to make up missing credits, e.g. through summer school, independent study, adult school, etc.**

### ***“Homeless” Children***

Under the McKinney – Vento Act “homeless” children include those lacking a “fixed, regular, and adequate nighttime residence,” and those “awaiting foster care placement.” These children have a right to stay in their “school of origin” the entire time they are in the shelter, and for the remainder of the school year if they are moved to foster placement.<sup>153</sup> The extent to which these rights apply to children in out-of-home care varies from state to state.

The McKinney-Vento Act provides eligible children with many rights and services, including:

- The right to remain in one school, even if their temporary living situation is located in another school district or attendance area, as long as remaining in that school is in their best interest. The school is known as the school of origin (defined as the school in which the student was last enrolled or where the student attended when permanently housed).
- The right to receive transportation to and from the school of origin.
- The right to enroll in school and begin participating fully in all school activities immediately, even if they cannot produce normally required documents, such as birth certificates, proof of guardianship, school records, immunization records, or proof of residency.
- Supplemental services such as tutoring and mentorship.

### ***Tuition & Funding for Post-Secondary Education***

Youths who have been in foster or other residential care under the conservatorship of DFPS may be exempt from the payment of tuition and fees at state supported junior colleges, four-year colleges or universities, and technical institutes.<sup>154</sup>

A student is exempt from the payment of tuition and fees at state-supported junior colleges, four-year colleges or universities, and technical institutes, as authorized in Chapter 54 of the Texas Education Code if the student:

- was under the conservatorship of the Department of Family and Protective Services:
  - on the day preceding the students 18th birthday;
  - on the day the student graduated from high school or received the equivalent of a high school diploma;
  - on or after the day of the students 14th birthday, if the student was also eligible for adoption (parental rights have been terminated) on or after that day;
  - during an academic term in which the student was enrolled in a dual credit course or other course for which a high school student may earn joint high school and college credit; or

<sup>153</sup> McKinney-Vento Act, 42 U.S.C. § 11432(g)(3)(A)(i).

<sup>154</sup> CPS Handbook 4700

- on the day preceding:
  - the date the student is adopted, if that date is on or after September 1, 2009;
  - on the date permanent managing conservatorship of the student is awarded to a person other than the student's parent, if that date is on or after September 1, 2009; and
- enrolls in an institution of higher education as an undergraduate student or in a dual credit course or other course for which a high school student may earn joint high school and college credit not later than the student's 25th birthday.<sup>155</sup>

*Adoption Assistance Agreements:* Another way a student is exempt from payment of tuition and fees is if the student was:

- adopted; and
- the subject of a signed adoption assistance agreement between DFPS and the adoptive parents under Subchapter D, Chapter 162, of the Texas Family Code.

The Texas Education Agency and the Texas Higher Education Coordinating Board shall develop outreach programs to ensure that adopted students in grades 9–12 formerly in foster or other residential care are aware of the availability of the exemption from the payment of tuition and fees.<sup>156</sup>

**» PRACTICE TIP :** If your client was previously placed in foster care, it is important to note that the Texas Legislature recently enacted Texas Family Code §262.114(c), which requires the Department to consider placing a child who has previously been in the managing conservator of the department with a foster parent with whom the child previously resided if:

- (1) the department determines that placement of the child with a relative or designated caregiver is not in the child's best interest; and
- (2) the place is available and in the child's best interest.

### Representation of Child in Previous Legal Matter

In some jurisdictions, the court or the attorney representing the Department may notify an attorney who represented a parent or child in a previous lawsuit filed by the Department. If possible, once you receive notice that a new legal action is being taken regarding your client, try to be present at the *ex parte* proceeding. Once a child's removal has been approved or ordered, it becomes more difficult to get a child out of care. This is a good opportunity to advocate for placement with a relative in lieu of foster care.

## Preparing for and Representing a Child in Court — The Hearings

Generally, the child's attorney must develop a position for each court hearing, and become familiar with the way the judge conducts these hearings. For example, will hearsay be allowed or will the judge conduct a more formal hearing using rules of evidence and direct/cross to elicit information from the parties? It is important to

<sup>155</sup> Tex. Educ. Code § 54.211.

<sup>156</sup> Tex. Educ. Code § 54.2111.

understand your appointed role — are you acting in the dual role of attorney and guardian *ad litem* or just as an attorney *ad litem*?

## The Adversary Hearing

In many jurisdictions, attorneys appointed to represent children in matters filed by the Department do not receive a great deal of notice of the appointment prior to the adversary or 14-day hearing. The child's attorney must find out as much information about the case as possible, meet with the client, and develop the child's position, usually in just a matter of days.

### Identifying Issues for the Adversary Hearing

**Identifying Necessary Parties.** Is there an absent parent or other person who is entitled to service of citation pursuant to § 102.009? The court or district attorney may still use an affidavit of status from the mother to help to identify any alleged fathers, although the requirement for the form was eliminated by the 2007 legislature.<sup>157</sup>

**Identification of Parent-Child Relationships.** Are the parents married? If not married, has paternity been established by a court order, and if so, where and when? Divorced? If divorced, when and where? If a court has previously made final orders concerning these children, obtain copies of these orders. Review the provisions in the orders for conservatorship, visitation, and support. Have the parents signed and filed an *Acknowledgment of Paternity* (AOP) with the Bureau of Vital Statistics? If so, obtain verification of the AOP or a copy of it to establish the parent-child relationship with the acknowledged father.

## Native American Tribes

Like a court of a foreign state under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), an Indian tribal court may have jurisdiction even though no prior child custody proceedings have been initiated in that court. A tribal court's jurisdiction under the Indian Child Welfare Act (ICWA) is different from UCCJEA jurisdiction, and subject to its own special rules.<sup>158</sup>

Through ICWA, Congress has expressed its clear preference for keeping Native American children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Native American children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Native American children shall follow strict procedures and meet stringent requirements to justify any results in an individual case contrary to these preferences.<sup>159</sup>

If a child, or either of the child's parents, is or might be a member of an American Indian tribe, notice to the tribe of a child custody proceeding is required, and the tribe may assert jurisdiction or intervene in the state's case. If the tribal affiliation of the child or parent is unknown, but some tribal affiliation appears to exist, notice to the Bureau of Indian Affairs is required. Moreover, if the child is found to be a member of a tribe or eligible to become a member of a tribe, standards of proof for removal from the home and for termination of parental rights are **higher** than those standards for other families.<sup>160</sup>

Failure to comply with requirements of the Indian Child Welfare Act may invalidate a final child custody order.<sup>161</sup>

The website for the Bureau of Indian Affairs can be found on the U.S. Department of the Interior website at: <http://www.doi.gov/bia/>

<sup>157</sup> See former § 161.105 (repealed 2007).

<sup>158</sup> 25 U.S.C. § 1901 et. Seq.

<sup>159</sup> Department of the Interior Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, incorporated as Appendix A in JONES, B.J., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN, 1995, American Bar Association, 134.

<sup>160</sup> 25 U.S.C. § 1912(f); *In the Interest of W.D.H., III*, 43 S.W.3d 30 (Tex. App. – Houston [14th Dist] 2001, pet. den.).

<sup>161</sup> 25 U.S.C. § 1914.

» **NOTE :** The Department should inquire about tribal affiliation or potential affiliation before or soon after the original petition is filed. Some areas of Texas are more likely than others to have a case involving Native American child. If the Department fails to provide notice in accordance with ICWA, an order of termination of parental rights and adoption may be set aside. This is a procedural hurdle that DFPS does not always clear, so another attorney may need to make an inquiry independently of DFPS.

» **PRACTICE TIP :** If there is any indication that the child may have Native American heritage, the Indian Child Welfare Act may apply. Counsel for the child should seek to identify and resolve ICWA issues early in the case, to avoid notice defects and other errors that may cause delay in the resolution of the case.

**Continuing, Exclusive Jurisdiction.** When you prepare the Original Answer of the AAL, you should also prepare the “Inquiry on Court of Continuing Jurisdiction for a Child,” one for each child in the case, with the child’s name and date of birth as these appear in the Original Petition. Verify the accuracy of these forms and mail them to the Bureau of Vital Statistics. You will receive a confirmation letter indicating the court of continuing jurisdiction or indicating that there is no court of continuing jurisdiction. If a court of continuing jurisdiction is verified and it is your county, obtain a copy of the final orders concerning the children from the applicable clerk’s office. If the court of continuing jurisdiction is not your county, jurisdiction needs to be transferred to your county.

**Identification of Potential Relative Placements.** In § 262.201(e), the court is directed to “place a child removed from the custodial parent with the child’s noncustodial parent or with a relative of the child if placement with the noncustodial parent is inappropriate,” unless these placements are not in the best interest of the child.

The Department is required to perform background and criminal history checks of relatives or other designated individuals identified as potential caregivers by the parents in a Proposed Child Placement Resources form. This form should have been given to the parents at the time of removal as required by § 261.307(a)(2). The Department is directed to identify the most appropriate substitute caregiver and to complete a home study on that individual prior to the full adversary hearing, and effective September 1, 2009, is required to file a home study with court.<sup>162</sup> The Department is also authorized to place a child with the designated relative without a home study.<sup>163</sup>

Based on interviews with parents, the child and others, the AAL should also make every effort to discover appropriate relatives who may be willing to care for the child during the case. While a relative is a family member related by blood or marriage, a “symbolic relative” can be a longtime family friend, neighbor or teacher. Both relatives and symbolic relatives will be considered by the Department and the court as potential placements as long as they are appropriate and, preferably, already have a relationship with the child.

**Conservatorship.** Who should be appointed temporary managing conservator? Who should be appointed a temporary possessory conservator? Can the child be returned to the parent(s) if the Court orders services addressing the cause of the referral?

**Placement.** What type of placement is best for the child? Should siblings be kept together or separated? Will the child be placed in or near your county, or far away?

Because the ICPC applies to placements outside of the state, by the time the agency begins the placement process, parental rights may have already been terminated and the attorney ad litem’s representation of the child has ended. The ICPC procedure is to be carried out by the state ICPC administrators in the sending and receiving

<sup>162</sup> Tex. Fam. Code § 262.114(a).

<sup>163</sup> Tex. Fam. Code § 262.114(b).



state. However, the process is notorious for causing lengthy delays in achieving permanency. For this reason, an attorney ad litem for a child should ask to stay on the case to see the child to permanency. Many times it takes many phone calls to the various offices to make sure the process is moving. As the AAL, you could make calls to remind the administrators and make sure your child client does not fall through the cracks.

**» PRACTICE TIP :** If the child's counsel anticipates any out-of-state placements, the Interstate Compact on the Placement of Children (ICPC) should be consulted.<sup>164</sup> In cases in which the ICPC applies, Courts are not free to make out-of-state placements in the absence of the approval of the state that will be receiving the child.<sup>165</sup> While the ICPC helps "receiving" States hold "sending" states financially responsible for the children they are sending, it adds months to the process of achieving placement or permanency for the child, even when the intended placement is with an appropriate non-custodial parent or blood relative, and in the child's best interest.

**Reminder:** As AAL for the child, ask to stay on the case so that you can make sure the child achieves permanency.

- **Make sure timeframes are met.**<sup>166</sup> Frequently, the process is delayed by state agencies not following the timeframes set out by law.
- **Check up on the agencies to make sure they are processing the application.**

**Visitation.** How often should the child and parents have contact, and for how long? Where should the visits take place? Should they be supervised or unsupervised? If supervised, must the Department staff supervise or may a relative do so? If siblings are separated, what orders should be made to ensure frequent contact?

**Services to Parents.** There are many services available to help families overcome the problems that led to the removal of the child. Some examples are parenting classes, counseling through local agencies or with private practitioners, treatment for alcohol or drug abuse, and homemaker services. Frequently, the Department may request a psychological evaluation of the parents to determine what services they might benefit from. Review the recommendations made by the Department in its court report for any helpful services that have been omitted.

**Services to Child.** Does the child need medical care? Counseling? An evaluation to determine need for developmental or counseling services? Is the child receiving adequate education? Does the child need some type of immediate crisis counseling? Does the child have adequate clothing? Is day care available? Does the child have any personal effects he/she wants?

**Child Support.** Is either parent employed? Should either parent be ordered to pay child support? How much? When should the payments begin? If child support payments were ordered in a previous suit, *e.g.*, divorce or Attorney General child support case, should the payments be redirected to the person or agency that now has responsibility of the child?

For indigent or near-indigent parents, reunification of the family may be better served by not having them pay child support to the state. The limited funds earned in these families may be spent on rehabilitation efforts, *e.g.*, securing housing so that the children may be returned home promptly. In such cases should specific payments in lieu of child support be ordered?

<sup>164</sup> *Id.* § 162.101et. seq.

<sup>165</sup> ICPC, § 161.102, Article III, subsection (d).

<sup>166</sup> See *NCJFCJ supra* note 17, at 55-64 for an explanation of the ICPC time frames.



**Should a CASA Be Appointed?** Would it be helpful for a community volunteer to represent the children as their guardian ad litem? A CASA may be able to help develop the facts of the case, provide an additional resource for family reunification efforts, and will be able to testify about the interaction of the parents and the children at visits, which the AAL cannot do. If it is foreseeable that what is in the best interest of the child may not be what the child client wants, you can avoid ethical conflicts by remaining as AAL and asking that CASA be appointed in the guardian ad litem role.

## Educational Advocacy

### Recent Federal Law and Policy

#### *The Fostering Connections to Success and Increasing Adoptions Act of 2008*

The Fostering Connections Act requires a state to provide assurances of the following:

- The child's foster care placement takes into account the appropriateness of the child's educational setting and the proximity to the school in which the child is enrolled at the time.
- The child welfare agency has coordinated with appropriate local educational agencies to ensure the child remains in the school in which he or she is enrolled at the time of placement; or if this is not in the child's best interest, assure that the child will be immediately and appropriately enrolled in a new school with all of the child's education records provided to the school.
- Each school-age child who receives federal (Title IV-E) assistance is enrolled in school full-time or has already completed high school.<sup>167</sup>

### Texas Law and Policy

#### *Time Frame for Enrollment and Submission of Records*

A caseworker must enroll a child in school no later than the third school day after the court order is rendered to remove the child from the home and place the child in DFPS conservatorship.<sup>168</sup> If the child cannot attend school due to a temporary physical or mental condition, the caseworker must give the school written notice that the child cannot attend but will return as soon as possible.

The caseworker must make every effort to allow the child to remain in the school the child was attending at the time of removal from the home. If the child is unable to attend that school, the caseworker must make every effort to allow the child to remain in the same school district.

A child in foster care is entitled to attend public schools in the district where the foster family resides. Youth in grades 9 through 12 have the option to complete high school at the school they were enrolled in when placed in foster care, even if the placement is outside the attendance area for the school district where the foster family resides.<sup>169</sup>

#### *School Options for Children Ages 3 and 4*

Children ages 3 and 4 who are or have ever been in DFPS conservatorship as the result of an adversary hearing are eligible for enrollment in the free pre-kindergarten programs offered at local public schools.<sup>170</sup>

Caseworkers obtain Letters of Verification for pre-kindergarten enrollment from their regional education specialist.

<sup>167</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008 P.L. 110–351.

<sup>168</sup> Tex. Fam. Code § 264.115; CPS Handbook: Section 4310.

<sup>169</sup> Tex. Educ. Code § 25.001 (F) & (G).

<sup>170</sup> CPS Handbook: Section 4200; Tex. Educ. Code § 29.153.

***School Options for Children Ages 5 Through 21***

All children who are in DFPS conservatorship and are at least 5 years old and younger than 21 years old on the first day of September of any school year must be enrolled in:

- a public school that has been accredited by the Texas Education Agency (TEA); or
- a private school accredited by the Texas Private School Accreditation Commission.<sup>171</sup>

The CPS assistant commissioner has the authority to approve a case-specific exemption.

If a child, who is at least 5 and under the age of 21, resides at a residential facility located in the [school] district, that child is entitled to benefits of the available school fund for that year. For purposes of enrollment in a school, a person who resides in a residential facility is considered a resident of the school district or geographical area served by the open-enrollment charter school in which the facility is located.<sup>172</sup>

A child placed in foster care by an agency of the state or by a political subdivision shall be permitted to attend the public schools in the district in which the foster parents reside free of any charge to the foster parents or the agency. A durational residence requirement may not be used to prohibit that child from fully participating in any activity sponsored by the school district.<sup>173</sup>

***Transition Assistance for Students in Substitute Care***

The Texas Education Agency (TEA) shall assist the transition of substitute care students from one school to another by:

- Ensuring that school records for a student in substitute care are transferred to the student's new school not later than the 14th day after the date the student begins enrollment at the school;
- Developing systems to ease transition of a student in substitute care during the first two weeks of enrollment at a new school;
- Developing procedures for awarding credit for course work, including electives, completed by a student in substitute care while enrolled at another school;
- Promoting practices that facilitate access by a student in substitute care to extracurricular programs, summer programs, credit transfer services, electronic courses provided under Texas Education Code Chapter 30A, and after-school tutoring programs at nominal or no cost;
- Establishing procedures to lessen the adverse impact of the movement of a student in substitute care to a new school;
- Entering into a memorandum of understanding with the Department of Family and Protective Services regarding the exchange of information as appropriate to facilitate the transition of students in substitute care from one school to another;
- Encouraging school districts and open-enrollment charter schools to provide services for a student in substitute care in transition when applying for admission to postsecondary study and when seeking sources of funding for post-secondary study;
- Requiring school districts, campuses, and open-enrollment charter schools to accept a referral for special education services made for a student in substitute care by a school previously attended by the student; and

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<sup>171</sup> Tex. Educ. Code § 25.001(A).

<sup>172</sup> Tex. Educ. Code § 25.001(B)(7); Tex. Educ. Code § 29.012(C).

<sup>173</sup> Tex. Educ. Code § 25.001(F).

- Providing other assistance as identified by the agency.<sup>174</sup>

### ***MOU between DFPS and TEA — Exchange of Information for Students in Foster Care***

TEA and the Department of Family and Protective Services shall enter into a memorandum of understanding (MOU) regarding the exchange of information as appropriate to facilitate the department's evaluation of educational outcomes of students in foster care.<sup>175</sup>

The memorandum of understanding must require:

- the department to provide TEA each year with demographic information regarding individual students who during the preceding school year were in the conservatorship of the department following an adversarial hearing under Section 262.201, Family Code; and
- TEA, in a manner consistent with federal law, to provide the department with aggregate information regarding educational outcomes of students for whom the agency received demographic information under Subdivision (1).

Information regarding educational outcomes includes information relating to student academic achievement, graduation rates, school attendance, disciplinary actions, and receipt of special education services.

Nothing in this section may be construed to:

- require the agency or the department to collect or maintain additional information regarding students in foster care; or
- allow the release of information regarding an individual student in a manner not permitted under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g) or another state or federal law.<sup>176</sup>

Also see the CPS handbook for requirements relating to *Creating a Child's Educational Record*, *Child's Education Portfolio*, and the *Child's Education Service Plan*.

### ***Children and Youth Eligible for Special Education***

Children who have physical, mental, or emotional disabilities often qualify for special educational services through the Texas Education Agency (TEA). Special education services are available for children from birth to age 21.<sup>177</sup> Children and youth eligible for special education services under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973 (Section 504) should have a written plan that describes the individualized instruction relating to the child/youth's needs.

### ***At the Adversary Hearing***

As is true in other temporary child custody hearings, the outcome of the Chapter 262 hearing sets a status quo for the litigation, one that is difficult to alter. Subsequent changes in this status quo will depend on how the case is progressing or not progressing. Progress is often measured by the parties' compliance with orders made at the Chapter 262 hearing. Consequently, the Chapter 262 hearing is a significant event in the case.

### ***Continuances and "Renew and Extend" Orders***

The Ex Parte Order signed by the judge who authorized removal of the children includes an order for the Chapter 262 hearing to occur at a specific time and date. It may be postponed or "continued" to a different date.

<sup>174</sup> Tex. Educ. Code § 25.007.

<sup>175</sup> Tex. Educ. Code § 7.029.

<sup>176</sup> Tex. Educ. Code § 7.029.

<sup>177</sup> CPS Handbook: Section 4700; CPS Handbook: Section 6579.

**Lack of Service.** The Chapter 262 hearing will have to be reset if the Department fails to obtain service of the hearing notice on at least one parent before the scheduled time of the hearing. When no parent has been served, the court will “renew and extend” the Ex Parte Order to a new date for the Chapter 262 hearing, usually 14 days hence. The “renew and extend” order is a new ex-parte order continuing the child in care and setting the new date.

**Appointment of Counsel.** In a termination case, an indigent parent who appears in opposition to a suit filed by the Department seeking either managing conservatorship or termination is entitled to a court-appointed attorney.<sup>178</sup> When the court appoints a lawyer under those circumstances, the judge sometimes postpones the Chapter 262 hearing so that the lawyer may meet with the parent and prepare for the hearing. Occasionally, parents will request postponements in order to give them additional time to obtain a lawyer for themselves.

### ***Negotiating Agreed Temporary Orders***

In most cases, the parties agree to orders arising from Chapter 262 hearings. They may negotiate the agreement in advance or, more commonly, on the day of the hearing in the corridor outside the courtroom. Or, the parents may not actively contest the facts that lead to the lawsuit being filed, but they do not agree with the Department's recommendations contained in the caseworker's court report. Or, they may dispute some facts and some recommendations, but they do not demand a full-fledged contested hearing. Instead, they stand before the bench and make a presentation to the judge. Any party may demand a full contested hearing, complete with sworn-in witnesses and evidentiary rules.

Regardless of the form of the hearing, the basis of the negotiations both outside the courtroom and before the bench is the caseworker's court report. The court report contains the Department's recommendations for what the court should order at the Chapter 262 hearing. Depending on your jurisdiction, the judge reads the report before or during the Chapter 262 hearing. The caseworker should provide copies of the report to all parties before the hearing, although that may occur minutes before the hearing. The child's attorney should review the report and recommendations and decide whether to support the recommendations and what, if any, other recommendations to make.

In addition, the recommendations in the court report form a starting point for negotiations. Before the hearing, the attorney should learn which recommendations the parents agree to and what issues they contest. The attorney should confer with the parties, the caseworker, and others involved in the case so that differences may be ironed out and alternatives explored. As an advocate solely for the child, the AAL stands in a powerful position to facilitate a settlement. While participating in these discussions, the attorney should document the names and addresses of the parties and attorneys who represent them, relatives or other witnesses, and other information that is gathered, such as the court and cause numbers of prior cases that may be known to the parents but not to the Department.

After preparing for the hearing, reviewing the court report, and participating in pre-hearing negotiations, the attorney should have in mind the presentation to make to the judge.

### ***Contested Hearings***

If the parties are unable to reach an agreement and request a hearing, the court will hear evidence. Often, the court will ask the parties to return to court on a different day for the contested hearing, which may be conducted before a different judge. The issues for the hearing are set out in Family Code § 262.201. The work done in the days leading up to the hearing should prepare the attorney to question witnesses and make argument at the Chapter 262 hearing.

Chapter 262 hearings look like any other hearings on temporary orders. Usually, after all parties announce ready, each party may make a brief opening statement outlining the position advocated and what the evidence is expected to show. Any stipulations of evidence or any agreements of the parties should be announced for the record at this time. The Department has the burden of proof and goes first, followed by the AAL and then the parents, in most cases.

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<sup>178</sup> Tex. Fam. Code § 107.013.

Although the other parties might cover all points with a witness, leaving the child's attorney with no questions, this happens very rarely. Instead, the role that the child's attorney takes at the hearing clearly reflects the necessity of having independent counsel for children. The child's advocate may ask the questions that no other party, out of self-interest, can ask.

Some of the rules-of-thumb for advocacy may be disregarded. For example, the attorney for the child may ask any number of questions without knowing the answers to any of them. Indeed, because time for preparation has often been short, there may be any number of questions that the attorney has no answers for until the hearing occurs. Hearsay evidence may be very useful to the child's advocate, particularly in situations where the only witnesses to alleged abuse are an infant and a parent who "takes the Fifth." Any error of the trial court at the Chapter 262 hearing cannot be corrected on appeal because the order made at the close of the hearing is temporary and is not subject to appeal.

### ***Documenting the Judge's Decision***

In whatever form the hearing proceeds — agreed or contested — the judge will announce a decision at its conclusion. A written court order may also be prepared following the hearing. When the attorney receives the proposed order, whether at court or later, he or she should compare the written order against notes made at the hearing to ensure that the order accurately reflects the judge's oral orders.

The court, at the conclusion of each Chapter 262 hearing, sets the date and time for the next hearing in the case.

*The Motion for Further Orders:* If a matter arises that requires the court's attention before the next scheduled hearing, you can file an appropriate motion for further orders and set it for hearing. The better practice is to confer with all counsel and unrepresented parties regarding setting the hearing before you actually obtain a setting. In some counties, the failure to confer is sanctionable under the local rules.

### **The Status Hearing**

Following the adversary hearing, the next statutorily required hearing is the status hearing, also known as the "60-day hearing." It is set no later than 60 days after the date the court rendered a temporary order appointing the Department temporary managing conservator of the child(ren).<sup>179</sup>

The status hearing is not a second opportunity to re-litigate the removal of the children or the findings made at the adversary hearing. In the absence of any motions set for hearing, the status hearing focuses on the child's status, ordering appropriate services for the family, making temporary orders as to conservatorship and placement, and visitation issues.

### ***Identifying Issues for the Status Hearing***

If there are outstanding issues unresolved after the adversary hearing, the child's attorney should address these issues in preparation for the status hearing, including:

- Identifying Necessary Parties
- Identification of Parent-Child Relationships
- Continuing, Exclusive Jurisdiction
- Identification of Potential Relative Placements
- Conservatorship
- Placement
- Visitation
- Services to Parents

<sup>179</sup> *Id.* § 263.201.

- Services to Child
- Child Support
- Appointment of CASA

### ***Service Plans***

The most important issue dealt with at the Status Hearing involves the Family Plan of Service. Not later than the 45th day after the date the court renders a temporary order appointing the department as temporary managing conservator of a child under Chapter 262, the Department must file a service plan.<sup>180</sup>

The Department shall consult with relevant professionals to determine the skills or knowledge that the parents of a child **under two years of age** should learn or acquire to provide a safe placement for the child. The department shall incorporate those skills and abilities into the department's service plans, as appropriate.<sup>181</sup>

To the extent that funding is available, the service plan for a child under two years of age may require therapeutic visits between the child and the child's parents supervised by a licensed psychologist or another relevant professional to promote family reunification and to educate the parents about issues relating to the removal of the child.<sup>182</sup>

Section 263.102 of the Texas Family Code sets forth what must be in the Service Plan. The plans are required to be in writing. They must be clear and understandable. In addition, they must be written in a language that the parents understand. The plan which is prepared by DFPS should be developed in conference with the parents, assuming of course, the parent's cooperation.

The Service Plan must state what the ultimate goal will be either return to the parents, termination of parental rights, or continuation of the child's care outside of the home. The Service Plan must clearly state any deadlines under the plan and it should state the steps the parents should take in order to have the child returned from foster care. If the child is already home, but under the Department's supervision, the plan should clearly describe the steps necessary to keep the child at home. The plan should not only lay out the parent's responsibility and the action that they need to take, but also the assistance that DFPS plans to provide to the parents and the child. If the parents need to acquire new skills or knowledge that should be spelled out in the plan as well as what behavioral changes must be made to achieve the goals in the plan. If applicable, the plan should state the steps the parents need to take to make sure the child attends school. The plan should also identify the individual at DFPS that the parents may contact.

The plan must include the statutory warning to parents about the consequences of non compliance with the plan.<sup>183</sup> Non-compliance with the plan can be grounds for termination.<sup>184</sup>

If the parents do not live in the same household and refuse to cooperate with each other and CPS in putting together the Service Plan, CPS has the discretion to choose one parent's home over the other.

Federal law requires that CPS give all parents some family reunification services and adoption promotion and support services. Even if the plan is for termination, under federal law, CPS must provide some family reunification services and if the plan is for the return of the child to the home, they will still provide adoption promotion and support services.<sup>185</sup>

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<sup>180</sup> *Id.* § 263.101; *see also Id.* §§263.102-103 (regarding service plan contents, signing & taking effect).

<sup>181</sup> *Id.* §§ 263.102(f).

<sup>182</sup> *Id.* §§ 263.102(g)

<sup>183</sup> *Id.* § 263.102(b).

<sup>184</sup> *Id.* § 161.001(o).

<sup>185</sup> *See*, Promoting Safe and Stable Families Amendments of 2001, Public Law 107-133..



**» PRACTICE TIP :** The review of the plan takes place at the status hearing. Raise any concerns you have about the plan. Do the recommended services address the concerns that led to the Department’s involvement with the family? Or, do you believe you should ask the Department to modify the plan of service? Should you request that the court delete from the plan services that you do not believe relate to the issues, or are redundant of other services? Has the department prepared a service plan for the family? Is it realistic and not overly burdensome to the parents? Does it adequately meet the needs of your client?

*Permanency Conferences.* The service plans are usually reviewed at meetings called Permanency Conferences (PC). These are meetings that the Department is required to conduct, and for which all parties are provided notice and the opportunity to attend. Attorneys who attend PCs often gain valuable information about their client’s compliance with the service plan, and possible changes in the long-term plan for the children.<sup>186</sup>

### Permanency Hearings

Review hearings held during the time that CPS has placed the child in temporary foster care are called “permanency” hearings.<sup>187</sup>

### Permanency

Achieving permanency for a child who is the subject of child protection litigation involves finding a safe, stable place where the child may grow up, with caretakers who have the legal responsibility for ensuring the child’s care. Lengthy stays in temporary foster care have been shown to create new problems for the child. A foster child lacks the security of knowing where and with whom the child will live, and for how long before another disruption. Absence of stability and permanency may impede the child’s emotional development. In making decisions about the child’s custodial environment, “[d]elay and indecision are rarely in a child’s best interests.”<sup>188</sup> Both CPS and the courts play significant roles in securing permanency for a child in foster care.

### Child to Attend Permanency Hearings

The child shall attend each permanency hearing unless the court specifically excuses the child’s attendance. The court is required to consult with the child in a developmentally appropriate manner regarding the child’s permanency plan, if the child is four years of age or older and if the court determines it is in the best interest of the child.<sup>189</sup>

### Child’s Permanency Plan

The Department must prepare a permanency plan in any case where the Department has been appointed temporary managing conservator. In 2009, the 81<sup>st</sup> Texas Legislature amended Texas Family Code §263.3025 to require the Department to include concurrent permanency goals consisting of a primary permanency goal and at least one alternate permanency goal.<sup>190</sup> Additionally, the 81<sup>st</sup> Texas Legislature enacted new Family Code §263.3026, which provides a laundry list of possible permanency plans for a child. As the statute makes clear, placing a child in the permanent managing conservatorship of the department should be the last alternative considered:

- (a) The Department’s permanency plan for a child may include as a goal:

<sup>186</sup> See *Id.* § 263.104 (amended service plan).

<sup>187</sup> *Id.* § 263.301, intro. cmt.

<sup>188</sup> *Comment*, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES B-5 (1996).

<sup>189</sup> *Id.* §§ 263.302.

<sup>190</sup> Senate Bill 939, Section 4, 81st Texas Legislature, 2009.



- (1) the reunification of the child with a parent or other individual from whom the child was removed;
  - (2) the termination of parental rights and adoption of the child by a relative or other suitable individual;
  - (3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or
  - (4) another planned, permanent living arrangement for the child.
- (b) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement for the child, the department shall document that there is a compelling reason why the other permanency goals identified in Subsection (a) are not in the child's best interest.<sup>191</sup>

The Department closely monitors the parent's compliance with services, and if the parent does not make adequate progress by a certain point in the case, the Department can change its primary permanency plan from re-unification to adoption (termination of the parent-child relationship), permanent relative placement, or permanent managing conservatorship to the Department. This change is usually first announced at the permanency conference or Family Group Conference (FGC).

*Family Group Conference (FGC).* Permanency Plans are developed at Permanency Conferences or at FGCs. FGCs can be used in lieu of permanency conferences depending on the level of family involvement. Family Group Conferencing is similar in function to a permanency conference. Parents are encouraged to invite individuals they want present, such as family and friends, for support, input, and feedback.

The Department must provide a copy of the permanency plan report to the parent, among others, no later than the 10th day before the date of the initial permanency hearing.<sup>192</sup>

### ***Initial Permanency Hearing***

Not later than 180 days after the date the court renders a temporary order appointing the Department as temporary managing conservator of a child, the court must hold a permanency hearing to review the status of, and permanency plan for, the child to ensure that a final order consistent with that permanency plan is rendered before the date for dismissal of the suit under this chapter.<sup>193</sup>

You are entitled to 10-days notice of the initial permanency hearing.<sup>194</sup> Typically, the parties get the original notice in open court, at the status hearing, but this does not satisfy notice required under § 263.301.

The Court is statutorily required to take specific actions at the initial permanency hearing.<sup>195</sup> Among them is to return the child to the parent if the parent can demonstrate the willingness and ability to provide the child with a safe environment; and the return of the child is in the child's best interest.<sup>196</sup> The Court will review the Child's Placement and Parent's Compliance with the Service Plan.

*Child's Placement.* If the Court does not find that returning the child to the parent(s) is in the child's best interest, the Court may place the child with a person willing and able to provide the child with a safe environment if that is in the child's best interest.<sup>197</sup> This could be a relative, symbolic relative, foster home, or if the child requires a more structured environment, a residential treatment center. The Court will evaluate the Department's efforts to identify relatives who could provide the child with a safe environment, if the child is not returned to a parent

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<sup>191</sup> *Id.*, Section 5.

<sup>192</sup> Tex. Fam. Code § 263.3025.

<sup>193</sup> *Id.* § 263.304.

<sup>194</sup> *Id.* § 263.301.

<sup>195</sup> See *Id.* § 263.306.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* § 263.306.

or another person entitled to service under chapter 102.<sup>198</sup> The child's placement, parental compliance, and permanency plan should be set out in the Department's permanency hearing court report.

*Parent's Compliance With the Service Plan.* The Court will again review the parents' compliance with temporary orders and the service plan, to determine to what extent progress has been made in alleviating or mitigating the causes necessitating the placement of the child in foster care.<sup>199</sup>

### The Department's Permanency Hearing Court Report

The Department's court report should include the objectives of the service plan and specific timeframes for accomplishing those objectives. Additionally, it should outline the services to be provided by CPS and describe those provided as well as the actions the parents have taken to remedy the cause for intervention.

Under Texas Family Code §263.303, the Department has a duty to file with the court and provide to each party, the child's attorney ad litem, the child's guardian ad litem and the child's volunteer advocate, a permanency progress report at least 10 days prior to the date set for each permanency hearing. The Permanency Progress Report shall include:

- the name of any person entitled to notice who has not been served;
- a description of efforts to locate and request service of citation of unserved parties;
- a description of each parent's assistance in providing information necessary to locate an unserved party;
- a recommendation that the suit be dismissed or continue;
- an evaluation of the parties' compliance with temporary orders and with the Service Plan;
- an evaluation of whether the child's placement in substitute care meets the child's needs, and if not, recommend other plans or services to meet the child's needs or circumstances;
- a description of the permanency plan for the child and recommended actions necessary to ensure that a final order consistent with that permanency plan, *including the concurrent permanency goals contained in that plan*, is rendered before the date for dismissal of the suit under this chapter;
- with respect to a child 16 years of age or older, services needed to assist the child in transition to adult life;<sup>200</sup> and,
- a summary of the child's medical care since the last hearing.<sup>201</sup>

Parents whose rights are being affected, the parent's attorney, the attorney *ad litem* for the child and the guardian *ad litem* may all file a response to the permanency progress report.<sup>202</sup> If so, the response must be filed at least three days before the hearing.<sup>203</sup> It should be noted that the list of those entitled to file a response is not as expansive as those entitled to notice, to be present and to be heard.

The attorney for the child should take the opportunity to challenge aspects of the Department's court report, if appropriate. Counsel should consider whether the proposed objectives and timeframes are reasonable and appropriate. The child's placement should also be carefully considered. Ask the parents and the child about

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* § 263.306(b)(1)(D).

<sup>200</sup> *Id.* § 263.303.

<sup>201</sup> *Id.* § 266.007.

<sup>202</sup> *Id.* § 263.303(c)

<sup>203</sup> *Id.*

placement options and consider what would be best for the family. For example, explore whether the visitation orders are appropriate. Keep in mind that reunification is almost always the primary goal; visitation should occur frequently and be at a time and place that is likely to support the parent/child relationship.

The court must determine in the initial permanency hearing whether the plan meets the child's needs and is the most permanent option for the child. Throughout the case, the child's attorney should take positions that are consistent with the permanency goals for the child. Before the permanency hearing, the child's attorney should:

- Review the agency's permanency plan
- Prepare to present evidence indicating whether it is a secure permanency option
- Determine whether the placement contributes to the child's development
- Prepare to present alternative options for permanency when necessary
- Where appropriate, prepare proposed orders for the court to direct the agency to satisfy reasonable efforts requirements (this could be an order for a specific service to the parent, investigation of a potential placement, etc.)
- Meet with the client in order to notify the court of the child's wishes.

### Subsequent Permanency Hearings

A subsequent permanency hearing before entry of a final order shall be held not later than the 120th day after the date of the preceding permanency hearing in the suit.<sup>204</sup> The procedures for subsequent permanency hearings are the same as those set out for the initial permanency hearing.<sup>205</sup> The Court can set more frequent permanency hearings.<sup>206</sup>

Family Group Conferences may be used at the end of a case to voluntarily return a child to family when it can be demonstrated that the family's resources will be marshaled to care for the child, such as providing child care while the parent is at work, or help for a disabled parent to care for a child.

If it has not become apparent sooner, by the second permanency hearing, you should know whether the Department will seek termination or permanent managing conservatorship of the child. Has the Department announced that the permanency plan for the child has been changed from reunification?

**» PRACTICE TIP :** Always ask what the permanency plan is for the child. Do not simply rely on the stated plan as indicia of where the case is headed. What are the service providers reporting? Has progress been excellent, unimpressive, marginal, non-existent? Has the parent obtained stable housing and maintained steady legal employment? Is the parent clean and sober? How extensive is the parent's history? Is there a long standing history of drug use, prior termination of parental rights, persistent CPS referrals, or criminal activity? What kind of picture do you see developing? Do the developing facts support the return of the child to the parent or another permanent plan for the child?

The court must consider return to the parent at each subsequent permanency hearing, if the parent is willing and able to provide the child with a safe environment AND return is in the best interest.<sup>207</sup>

<sup>204</sup> *Id.* § 263.305.

<sup>205</sup> *Id.* § 263.306.

<sup>206</sup> *Id.* § 263.305.

<sup>207</sup> Tex. Fam. Code Ann §§ 263.306, 263.307.

Explore the possibility of a return and dismissal or a monitored return before the second permanency hearing held pursuant to Section 263.306. Discuss the possibility of a transition plan to re-introduce the child into the parent's life / home.

## Medical Care and Treatment; Consent and Reviews

Except in an emergency, medical care may not be provided to a child in foster care unless the person authorized by court order (which may be the child, if the child is at least 16 years of age) consents to the medical care.<sup>208</sup> The court may designate DFPS as the "medical consenter," but DFPS must within five business days file with the court and each party the name of an individual who will exercise the duty and responsibility of providing informed consent on behalf of DFPS.<sup>209</sup>

The Court is required to review the medical care being provided to a child in foster care at each hearing under Chapter 263, Family Code. This chapter includes the Status Hearing, each Permanency Hearing and the Placement Review hearings after entry of an order granting DFPS PMC of the child. At each hearing DFPS must provide, and the court must review, a summary of the medical and mental health care provided to the child.<sup>210</sup>

### Judicial Review of Medical Care

The summary must include the following information:

1. The nature of any emergency care provided and the circumstances that necessitated it.
2. All treatment that the child has received and the progress of the treatment.
3. Any medication prescribed and for what it was prescribed and how it is working.
4. Extent to which the foster care provider has complied with treatment.
5. Any adverse reactions or side effects to treatment.
6. Any new diagnosis or tests being conducted for a diagnosis.
7. Any activity the child should avoid or engage in that affects treatment including physical activities, medications or diet.
8. Any information required by the court or other role.

At each hearing the child should be allowed to address the court about the medical treatment.<sup>211</sup>

### Court Responsibility to Hear from the Foster Child

At each hearing, the foster child must be provided an opportunity to express to the court the child's views on the medical care being provided to the child.<sup>212</sup> This opportunity must be provided regardless of the age of the child.

### Court Responsibility with Respect to Child 16 or Older

Special consent rules apply to foster children who are at least 16 years of age. When a child of 16 enters care, or before the 16th birthday of a child already in care, DFPS is required to notify the child of his or her right to ask the court for authorization to consent to his or her own medical care. Training

<sup>208</sup> Tex. Fam. Code § 266.004(A)-(B).

<sup>209</sup> *Id.* § 266.004(c), *see also* CPS Handbook 6521.

<sup>210</sup> *Id.* § 266.007(a)-(b), *see also* CPS Handbook 6521.17.

<sup>211</sup> Tex. Fam. Code § 266.007.

<sup>212</sup> *Id.* § 266.007(a)-(b).

for the child on informed consent must be provided as part of the Preparation for Adult Living (PAL) program.<sup>213</sup>

If the trial court at any hearing “determines that the child has the capacity to consent to medical care” then the child should be authorized to be her own “medical consenter” for all care except abortion, which continues to be controlled by Chapter 33, Family Code.<sup>214</sup> No burden of proof is specified for this determination; but if the court decides that the child lacks capacity that determination may be considered de novo at each subsequent review hearing.<sup>215</sup> The order authorizing the child to consent may be limited to certain treatments or procedures, or may be general, for all medical care.<sup>216</sup> Standard requirements for a medical consenter continue to apply if the court determines that the child lacks capacity to consent.<sup>217</sup>

This section does not apply to emergency medical care or to a child who is an inpatient at a mental health facility where medication is part of the involuntary treatment being provided.<sup>218</sup>

### Hearing to Determine Child's Capacity to Consent

If the trial court does not consider the issue sua sponte, the child's attorney ad litem may file a petition for a hearing and order determining the child's capacity to consent to medical care.<sup>219</sup>

### Overruling Child's Refusal to Consent.

If a child who has been given the authority to consent refuses to consent to medical care, DFPS may file a motion requesting specific authorization for proposed medical care.<sup>220</sup> The motion for court-ordered medical care must include: (1) the child's stated reasons for refusing the recommended care, and (2) a statement prepared and signed by the treating physician that the medical care is the proper course of treatment for the foster child.<sup>221</sup> A motion filed without a description of the child's objections or without the treating physician's statement is defective, and should not result in a hearing.

### Attorney ad Litem Required for Treatment Hearing

The child is entitled to representation by an attorney at litem, and if the former attorney has been discharged, an attorney must be appointed for the medical care hearing. The foster child's attorney ad litem shall: (1) discuss the situation with the child; (2) discuss the suitability of the medical care with the treating physician; (3) review the child's medical and mental health records; and (4) advocate to the court on behalf of the child's expressed preferences regarding the medical care.<sup>222</sup>

### Hearing to Overrule Child's Refusal to Consent

The burden of proof is on the party requesting an order overruling the child's refusal of treatment to show **by clear and convincing evidence** that the medical care is in the **best interest** of the foster child **and**: (1) the foster child **lacks the capacity** to make a decision regarding the medical care; (2) the failure to provide the medical care will result in an observable and material **impairment to the growth, development, or functioning** of the foster child; **or** (3) the foster child is at risk of suffering substantial bodily harm or of inflicting **substantial bodily harm** to others.<sup>223</sup>

<sup>213</sup> *Id.* § 266.010(l).

<sup>214</sup> *Id.* § 266.010(a)-(b).

<sup>215</sup> *Id.* § 266.010(b).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* § 266.010(c).

<sup>218</sup> *Id.* § 266.010(j)-(k).

<sup>219</sup> *Id.* § 266.010(b).

<sup>220</sup> *Id.* § 266.010(d).

<sup>221</sup> *Id.* § 266.010(e).

<sup>222</sup> *Id.* § 266.010(f).

<sup>223</sup> *Id.* § 266.010(g).

In making the “best interest” decision, the court must consider: (1) the foster child’s expressed preference regarding the medical care, including perceived risks and benefits of the medical care; (2) likely consequences to the foster child if the child does not receive the medical care; (3) the foster child’s prognosis, if the child does receive the medical care; and (4) whether there are alternative, less intrusive treatments that are likely to reach the same result as the medical care being proposed.<sup>224</sup>

In making the “capacity to consent” decision, the court must consider: (1) the maturity of the child; (2) whether the child is sufficiently well informed to make a decision regarding the medical care; and (3) the child’s intellectual functioning.<sup>225</sup>

### Health Passports

Starting in 2007, DFPS was required to implement “health passports” for children in foster care, with specific statutorily mandated information so that appropriate health information will follow each child throughout that child’s time in care.<sup>226</sup> These medical care provisions open new doors for attorneys representing children to ensure that each child receives the attention and health care needed.

### Health Care

In 2005, the 79th Legislature directed the Health and Human Services Commission (HHSC) to create a new health care delivery model to provide foster children with comprehensive services, a “medical home,” and coordinated access to care. HHSC worked with the DFPS to develop STAR Health, a new Medicaid managed-care model for foster children, which was implemented on April 1, 2008.<sup>227</sup>

## The One-Year Deadline for Finality in CPS Cases

If the trial court has not commenced the trial on the merits or granted an extension, on the first Monday after the first anniversary of the date the Court rendered a temporary order appointing the Department as temporary managing conservator, the Court must dismiss the suit filed by the Department, that requests termination of the parent-child relationship or requests that the Department be named conservator of the child.<sup>228</sup>

The statutory dismissal date is not jurisdictional.<sup>229</sup> A party to the suit who fails to make a timely motion to dismiss the suit, waives the right to object to the Court’s failure to dismiss the suit. A motion to dismiss is timely if the motion is made before the trial on the merits commences.<sup>230</sup>

*Extension of Dismissal Deadline.* Unless the court has commenced the trial on the merits, the court may not retain the suit on its docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the best interest of the child. If the court makes those findings, it may retain the suit on its docket for a period not to exceed 180 days after the time described by Subsection (a).<sup>231</sup>

If the Court extends the one-year deadline, it must render an order that: (1) schedules a new date on which the suit will be dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a); (2) makes further temporary orders for the safety and welfare of the child as necessary; and (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).<sup>232</sup>

<sup>224</sup> *Id.* § 266.010(i).

<sup>225</sup> *Id.* § 266.010(h).

<sup>226</sup> *Id.* § 266.006.

<sup>227</sup> More information regarding this program, STAR Health, is located at: <https://www.fostercaretx.com/portal/public/fc>

<sup>228</sup> Tex. Fam. Code § 263.401(a) [effective for SAPCRs filed on or after June 15, 2007, only].

<sup>229</sup> *In re Department of Family & Protective Services*, 273 S.W.3d 637 (Tex. 2009) (orig. proceeding)

<sup>230</sup> *Id.* § 263.402(b) [effective for SAPCRs filed on or after June 15, 2007, only].

<sup>231</sup> *Id.* § 263.401(b). [effective for SAPCRs filed on or after June 15, 2007, only].

<sup>232</sup> *Id.* [Effective for cases filed on or after June 15, 2007, only].



If the court grants an extension but does not commence the trial on the merits before the date for dismissal under Subsection (b), the Court shall dismiss the suit.<sup>233</sup> The court may not grant additional extensions that extend the suit beyond the required date for dismissal under Subsection (b).<sup>234</sup> Nor may the parties extend the deadlines by agreement or otherwise.<sup>235</sup>

***Motion to Dismiss.*** As with the original deadline, under the extended deadline, if a party fails to make a timely motion to dismiss the suit, she waives the right to object to the court's failure to dismiss the suit. A motion to dismiss under this subsection is timely if made before the trial on the merits commences.<sup>236</sup>

### **Monitored Return of Child**

The court may retain jurisdiction and not dismiss the suit or render a final order as required by §263.401 if the court renders a temporary order that: (1) finds that retaining jurisdiction is in the best interest of the child; (2) orders the Department to return the child to the child's parent; (3) orders the Department to continue as the child's temporary managing conservator; and (4) orders the Department to monitor the child's placement to ensure that the child is in a safe environment.<sup>237</sup> The order must contain specific findings regarding the grounds for the order and schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced.<sup>238</sup>

### **Removal of Child from Monitored Return**

If a child placed with a parent under §263.403 must be removed from the home by the Department before the dismissal of the suit or the commencement of the trial on the merits, the Court shall, at the time of the move, schedule a new date for dismissal of the suit unless a trial on the merits has commenced. The new dismissal date may not be later than the original dismissal date established under §263.401 or the 180th day after the date the child is moved under §263.403, whichever is later.<sup>239</sup>

If the placement back in the home extends beyond the 180 days, both state and federal law require a new Chapter 262 removal order. If the child is removed from the home after 180 days of monitoring, in the absence of a new removal order, the suit is subject to dismissal.<sup>240</sup>

### **Achieving Legal Permanency for your Child-Client**

Like the parent's attorney, the AAL for the child should work the case as if trial on the merits is a likely option. It is important to evaluate the evidence at the beginning of the case because of the impact it can have on the child's permanency plan. For example, if there is evidence of sexual abuse and criminal charges pending against one parent for the abuse, it could affect the permanency plan for the child. Or, if there is insufficient evidence to support termination of parental rights, other permanency options should be explored.

### **Seeking Resolution through Mediation or Trial**

A prompt resolution of the case is presumed to be in the best interest of the child, and all the various standards encourage a prompt resolution of the case and the use of alternative dispute resolution.<sup>241</sup> Mediation may be a particularly difficult phase of the case for the child's attorney. It is imperative the child's attorney ad litem seek the child's direction prior to the mediation. As the "dual role" attorney, the lawyer will usually be expected to "sign" for the child; usually without the child's presence at the mediation. If a guardian ad litem has been appointed, mediation may bring out inherent conflicts between the guardian's "best interest" position and the "expressed objectives" of the child. Effective communications and appropriate advice and counsel for the child

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<sup>233</sup> *Id.* § 263.401(c). [Effective for cases filed on or after June 15, 2007, only].

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* § 263.402(a).

<sup>236</sup> *Id.* § 263.402(b). [Effective for cases filed on or after June 15, 2007, only].

<sup>237</sup> *Id.* § 263.403(a).

<sup>238</sup> *Id.* § 263.403(b). [Effective for cases filed on or after June 15, 2007, only].

<sup>239</sup> *Id.* § 263.403. [Effective for cases filed on or after June 15, 2007, only].

<sup>240</sup> *Id.* § 263.403, cmt.

<sup>241</sup> See ABA Standard C-6.



prior to mediation or final trial are essential. If the child's testimony becomes necessary, the lawyer has a specific duty to prepare the child witness for trial, question the child appropriately, and defend the testimony against attack by showing it to be reliable and competent.<sup>242</sup>

### » PRACTICE TIPS for Child's Attorney in Mediation :

- **Objective is to gain legal permanency for client**
- **Explain what mediation is to your client in a manner that is appropriate for your client's age and competencies**
- **Ensure you understand what your client would like to happen with the outcome of the case**
- **Does your client want to be adopted?**
- **Have you thoroughly explained the difference between being in the legal conservatorship of the Department or a responsible adult versus being adopted?**
- **Will your client allow you to agree to a settlement agreement that has the effect of terminating his parent's rights?**
- **Do not give up the child's expressed wishes and argue the best interest of the child if you are serving in the dual role**
- **Include a provision in the mediated settlement agreement continuing your appointment until your client is placed in a permanent placement through adoption or legal guardianship with a suitable, responsible adult, not the Department.**

» **PRACTICE TIP :** In some cases, parents may request placement with a relative for the first time in mediation. Generally, relative placements offer much for child clients. Unfortunately, this may occur after the child has been in a stable foster care placement for many months, the child has bonded to the placement, and the placement seeks to adopt the child. If this occurs, counsel for the child may want to insist on very tight language in a Mediated Settlement Agreement (MSA), e.g., requiring the parent to propose a specific relative or relatives; limiting the amount of time the named relative has to contact the caseworker and complete the initial paperwork and adoption education requirements; and requiring that the named relative pass an initial criminal background check.

### **Trial**

The child's attorney plays a critical role during trial. Often the child's attorney has more knowledge of evidence specific to the child than any other attorney on the case. It is incumbent on the child's attorney to prepare for trial as if he carries the burden of proof.

<sup>242</sup> See ABA Standards D-7, D-8 and D-9.

For more information regarding trial preparation, please see Chapter 9.

### **Role of Child Attorney in Appeals of CPS Cases**

An appeal of a final order rendered in a CPS termination case is governed by the rules for accelerated appeals in civil cases and the procedures provided in §263.405.<sup>243</sup> Although these cases are supposed to be accelerated, any appealed case remains at the appellate level for a significant period of time, perhaps years. If you remain on the case after the final order of termination is entered, you may need to file motions or other legal documents in the appellate court with jurisdiction over the case.

### **Advocating at Placement Review Hearings**

Continued appointment of a child's attorney ad litem after a final legal resolution is reached is not consistent across the state. In some counties, the attorney is dismissed as part of the final order. In others, the appointment continues until the child leaves foster care, by aging out at age 18, by being adopted, or by a modified decree granting a person, not the Department, as permanent managing conservator.

Depending on the final legal resolution on the case, placement review hearings may serve different purposes for children. If the child enters the permanent managing conservatorship of the Department as a result of a court terminating the parents' parent-child relationship, the Department should work to find an adoptive home and to seek an adoption consummation. When a child enters the permanent managing conservatorship of the Department without an order terminating parental rights and the Department has been unable to locate an adoptive placement or the child chooses to not be adopted, the long-term plan for the child is likely long-term foster care. In that case, the Department should address the child's needs and ensure the child's placement is appropriate.

Representing a child after a final order is rendered is significantly different from representing a child under the temporary managing conservatorship of the Department. For the most part, the big picture legal issues have been determined. Despite this, children in permanent managing conservatorship of the Department often need an advocate at a time when court reviews become more infrequent and the attorney earlier appointed to represent the child has been dismissed from the case.

**» PRACTICE TIP :** At all review hearings, counsel for the child should evaluate the services currently being provided to the child; if the child's needs are not being met or new problems have arisen, the service plan may need to be updated. Counsel should continue to seek alternatives to long-term foster care through return to a parent, or adoption or guardianship with a relative or symbolic relative. Also, as the child approaches adulthood, counsel should ensure that a transition plan is in place, addressing post-secondary education and/or employment, housing, health care, etc.

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<sup>243</sup> Tex. Fam. Code §263.405.

**» PRACTICE TIP :** Many youth who remain in foster care until they turn eighteen, elect to return to the family that includes the parent or parents designated a perpetrator of abuse or neglect. This election used to disqualify the youth from eligibility for transitional living services and other foster care benefits. The 81st Legislature amended Texas Family Code 264.121 to allow a youth who is at least 18 years of age to receive transitional living services, and other foster care benefits, while residing with a person who was previously designated as a perpetrator of abuse or neglect if the Department determines that despite the person’s prior history, the person does not pose a threat to the health and safety of the youth. This eliminates a dilemma for courts considering post-PMC reunification as the child approaches majority.<sup>244</sup>

**» PRACTICE TIP :** In some cases, a youth will become a parent while still in foster care. Counsel for teen parents must not only address issues regarding transition to adulthood as discussed above, but also ensure that their clients receive appropriate services to help them succeed as parents. Counsel should consider requesting placement with a supportive relative or in a specialized foster home for teen parents, childcare to enable the teen parent to attend school or job training, or age-appropriate parenting classes, support groups, counseling, etc.

## Services for Older Youth

### Transition Living Services Program (formerly Preparation for Adult Living)

During the 2009 legislative session, Texas Family Code §264.121 was amended, resulting in the former Preparation for Adult Living (PAL) program being encompassed by the Transitional Living Services Program. “Transitional Living Services Program” means a program, administered by the Department in accordance with Department rules and state and federal law, for youth who are age 14 or older but not more than 21 years of age and are currently or were formerly in foster care that assists youth in transitioning from foster care to independent living. The program provides transitional living services, Preparation for Adult Living Program services, and Education and Training Voucher Program services.<sup>245</sup>

The Department is now required to expand efforts to improve transition planning and increasing the availability of transitional family group decision-making to all youth age 14 or older in the Department’s permanent managing conservatorship, including enrolling the youth in the Preparation for Adult Living program before the age of 16.<sup>246</sup>

The Department shall require a foster care provider to provide or assist youth who are age 14 or older in obtaining experiential life-skills training to improve their transition to independent living. Experiential life-skills training must be tailored to a youth’s skills and abilities and may include training in practical activities that include grocery shopping, meal preparation and cooking, using public transportation, performing basic household tasks, and balancing a checkbook.<sup>247</sup>

<sup>244</sup> Tex. Fam. Code § 264.121(d), as amended by H.B. 1912, 81st Leg., R.S. (2009) [Effective September 1, 2009].

<sup>245</sup> Tex. Fam. Code Section 264.121(b)(3).

<sup>246</sup> Tex. Fam. Code Section 264.121(a)(1).

<sup>247</sup> Tex. Fam. Code Section 264.121(a)-(1).

The Department shall allow a youth who is at least 18 years of age to receive transitional living services, other than foster care benefits, while residing with a person who was previously designated as a perpetrator of abuse or neglect if the department determines that despite the person's prior history the person does not pose a threat to the health and safety of the youth.<sup>248</sup>

The Department shall require a person with whom the department contracts for transitional living services for foster youth to provide or assist youth in obtaining:

- 1) housing services;
- 2) job training and employment services;
- 3) college preparation services;
- 4) services that will assist youth in obtaining a general education development certificate; and
- 5) any other appropriate transitional living service identified by the department.<sup>249</sup>

### **Texas Youth Connection**

The Department has, partly in response to legislative mandates, established a web site called "Texas Youth Connection" currently housed in the DFPS system. Although targeted at youth, the web site contains a great deal of information about programs and services available for older foster care youth that can be of great help to attorneys and guardians ad litem working with these youth.

Many of the resources and information for older youth in foster care can be found on the Texas Youth Connection web site. In addition to PAL services, the site has information on housing, employment and other services and is located at: <http://www.dfps.state.tx.us/txyouth/welcome.asp>.

### **Tuition & Funding for Post-Secondary Education**

Youth who have been in foster or other residential care while in the conservatorship of DFPS may be exempt from the payment of tuition and fees for post-secondary education.

A student is exempt from the payment of tuition and fees at state-supported junior colleges, four-year colleges or universities, and technical institutes, as authorized in Chapter 54 of the Texas Education Code, if the student:

- was under the conservatorship of the Department of Family and Protective Services:
  - on the day preceding the student's 18th birthday;
  - on the day the student graduated from high school or received the equivalent of a high school diploma;
  - on or after the day of the student's 14th birthday, if the student was also eligible for adoption (parental rights have been terminated) on or after that day;
  - during an academic term in which the student was enrolled in a dual credit course or other course for which a high school student may earn joint high school and college credit; or
  - on the day preceding:
    - the date the student is adopted, if that date is on or after September 1, 2009;

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<sup>248</sup> Tex. Fam. Code Section 264.121 (d).

<sup>249</sup> Tex. Fam. Code Section 264.121(f).

- on the date permanent managing conservatorship of the student is awarded to a person other than the student's parent, if that date is on or after September 1, 2009; and
- enrolls in an institution of higher education as an undergraduate student or in a dual credit course or other course for which a high school student may earn joint high school and college credit not later than the student's 25th birthday.<sup>250</sup>

The Texas Education Agency and the Texas Higher Education Coordinating Board shall develop outreach programs to ensure that adopted students in grades 9–12 who were formerly in foster or other residential care are aware of the availability of the exemption from the payment of tuition and fees.<sup>251</sup>

***Tuition Waiver Letters:*** The district PAL coordinator or the district designee is responsible for researching a youth's eligibility for a tuition waiver. If a youth is eligible and will be entering a state supported college or technical institute (as defined by Tex. Educ. Code 54.001 and 54.002), the PAL coordinator or district designee provides a tuition waiver letter to the youth to take to the Registrar's Office of the college or institution. The tuition letters must be signed by either the district director or CPS program administrator.

### **Employment Preference for Former Foster Children**

An individual who was in the permanent managing conservatorship of DFPS on the day preceding the individual's 18th birthday is entitled to a preference in employment with a state agency over other applicants for the same position who do not have a greater qualification.<sup>252</sup> This employment preference applies solely to individuals 25 years of age or younger.<sup>253</sup>

### **Provision of Certain Records**

If at the time a child is discharged from foster care, the child is at least 18 years of age or has had the disabilities of minority removed, the department shall provide to the child, not later than the 30th day before the date the child is discharged from foster care, a copy of:

- (1) the child's birth certificate;
- (2) the child's immunization records;
- (3) the information contained in the child's health passport;
- (4) a personal identification certificate under Chapter 521, Transportation Code;
- (5) a social security card or a replacement social security card, if appropriate; and,
- (6) proof of enrollment in Medicaid, if appropriate.<sup>254</sup>

<sup>250</sup> Tex. Educ. Code § 54.211.

<sup>251</sup> Tex. Educ. Code § 54.2111.

<sup>252</sup> Texas Government Code, §672.002.

<sup>253</sup> *Id.*, §672.005.

<sup>254</sup> Tex. Fam. Code, §264.014.



*This Chapter is derived primarily from an article written by the Karin E. Bonicoro, Judge of the Child Protection Court of Central Texas. Special thanks to Judge Bonicoro for this important contribution.*

### The Right to Appointed Counsel

A parent's right to legal representation in a CPS case is not a constitutionally guaranteed right.<sup>1</sup> Rather, the appointment of an attorney to represent a parent in a CPS case is statutorily mandated in the Texas Family Code.<sup>2</sup> The Texas Supreme Court has held that the statutory right to court-appointed counsel includes the right to have that representation be effective.<sup>3</sup> Parents in CPS cases often are unfamiliar with the procedures and substantive law that apply to such cases. It is the duty of the parent's attorney to provide effective assistance to the parent throughout the CPS case. Without competent representation, a parent may be denied a fair process in a case in which their parental rights are at stake. If the process is not fair, then we have not served the best interests of the child.

Attorney appointments are handled in a variety of ways depending on the jurisdiction where the suit is filed, but in all jurisdictions, the county in which the attorney is appointed is responsible for payment of the attorney fees.<sup>4</sup> Because each county determines the amount of attorneys' fees, compensation for appointed attorneys varies widely around Texas. If the parents are indigent, the county must pay the court appointed attorneys according to the fee schedule set for defense of juveniles under Title 3 of the Texas Family Code.<sup>5</sup>

To be entitled to appointment of an attorney in the trial court, a parent must both "respond in opposition" to the suit and establish indigence. A parent is not required to file pleadings or use particular words of art in order to "respond in opposition" to the suit. Simply appearing and stating on the record "I want my rights" is enough.<sup>6</sup>

*Appointment of Attorney Where Indigence Required:* The timing of the appointment of an attorney *ad litem* for an indigent parent who appears in opposition in the case has been a matter of debate. Before September 1, 2005, the question turned on when the Department was actually requesting termination of parental rights. Since that date, the right to court-appointed attorney arises when the Department files suit "requesting temporary managing conservatorship" (TMC) of the parent's child. Since a TMC order is necessary for placement of a child in foster care, this new provision seems to give the parent an immediate right to request appointed counsel.

The statute does not explicitly set a deadline for the court to make the appointment. The question probably remains whether the timing of the appointment denied the parent due process.<sup>7</sup> To obtain reversal for late appointment of counsel, the appellant must "show that the trial court's failure to timely appoint counsel probably caused the rendition of an improper judgment or probably prevented her from properly presenting the case to

1 See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (indigent parents' constitutional right to counsel under 14th Amendment Due Process is made on case-by-case basis when state seeks to terminate parental rights).

2 Tex. Fam. Code § 107.013.

3 *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

4 *Id.* § 107.015.

5 *Id.* § 107.015(c).

6 *In re T.R.R.*, 986 S.W.2d 31, 37 (Tex. App. – Corpus Christi 1998, no pet.).

7 See *In the Interest of M.J.M.L.*, 31 S.W.3d 347, 354-5 (Tex. App. – San Antonio 2000, pet. denied) (appointment of counsel six months after the suit was filed upheld).



[the appellate] court.”<sup>8</sup> Because the right to an appointed counsel includes the right to have representation be effective,<sup>9</sup> it is probable that appointment of counsel made so late in the process as to render that representation ineffective would violate due process.

However, a parent who is personally served in a termination case and who does not respond to the citation or appear in court in opposition to the termination is not entitled to the appointment of an attorney ad litem, even if indigent. With limited exceptions, the trial court has a mandatory duty to appoint counsel only if the case is (1) a suit filed by a governmental entity (2) for the termination of parental rights or requesting temporary managing conservatorship of the parent's child, and (3) the parent responds (4) in opposition and (5) establishes indigence.<sup>10</sup> No hearing is required on the claim of indigence unless an affidavit of indigence is filed by the parent requesting a court-appointed attorney.<sup>11</sup> The parent must provide an affidavit of indigence before the court may conduct a hearing to determine the parent's indigence.<sup>12</sup> The affidavit must meet the requirements set forth in Texas Rule of Civil Procedure 145(b).<sup>13</sup>

The Family Code gives no guidance with respect to what constitutes indigence for the purpose of a court appointed trial attorney in a CPS case. A trial court's determination that a parent is not indigent is reviewed under an abuse of discretion standard. One court of appeals has held that “indigent” means “a person who does not have the resources, nor is able to obtain the resources, to hire and retain an attorney for representation in the termination case.”<sup>14</sup>

*Appointment of Attorney Without Proof of Indigence:* The Family Code requires appointment of an attorney for the parent without proof of indigence for: (1) a parent who was served by publication; (2) an alleged father who failed to register with the paternity registry and whose identity or location is unknown; or (3) an alleged father who registered with the registry, but could not be served at the address provided to the registry or at any other address known to the petitioner.<sup>15</sup> It should be noted that a parent in any of these categories who actually appears in person or is subsequently personally served does *not* continue to have an automatic right to court-appointed counsel under these subsections. The right to court-appointed counsel for a parent who is personally served or personally appears in the case must be established under Texas Family Code § 107.013(a)(1) or (c).

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<sup>8</sup> *In re J.M.E.*, No. 2-04-198-CV (Tex. App.-Fort Worth 2005, no pet.) (slip.op. @ 5) (mem.op.).

<sup>9</sup> *See In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

<sup>10</sup> Tex. Fam. Code § 107.013 (a)(1), & (c).

<sup>11</sup> *Id.* § 107.013 (d).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *In re C.D.S.*, 172 S.W.3d 179, 185 (Tex. App. – Fort Worth 2005, no pet.) (where the parent filed an affidavit showing her only source of income was government assistance, the trial court erred in finding her not indigent, and the failure to appoint counsel was held to be reversible error).

<sup>15</sup> Tex. Fam. Code § 107.013(a)(2), (3), (4).

» **NOTE : *Alleged Fathers Whose Identity & Whereabouts are Known.*** The Texas Family Code § 101.024 defines “parent” to mean: the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.<sup>16</sup>

Texas Family Code Section 101.024 does not define an alleged father whose identity and location are known as a parent; and § 107.013 does not require that the court appoint him an attorney. His legal status as a parent must be established by one of the means outlined in § 101.024. Therefore, an alleged father who responds in opposition to the suit, and is indigent, is not entitled to an appointed attorney until he acquires status as a “parent.” For example, assume an alleged father appears and requests paternity testing to determine if he is the biological father of the child. Until he is adjudicated the father, based on the results of the DNA testing, his right to an appointed attorney does not attach.<sup>17</sup> Thus, the indigent alleged father must temporarily proceed pro se.

*Appointment of Counsel for a Parent with Mental or Emotional Illness, or Mental Deficiency:* In cases in which the Department pleads as a ground for termination that the parent has a mental or emotional illness or a mental deficiency that in all probability renders the parent unable to provide for the physical, emotional and mental needs of the child until the child’s eighteenth birthday, the court must appoint the parent an attorney immediately after the filing of the suit.<sup>18</sup> This appointment is without regard to indigence.<sup>19</sup> The parent may retain a different attorney and the court appointed attorney may be discharged, but only “with the permission of the court.”<sup>20</sup>

*What if the Department Fails to Plead Section 161.003 as a Ground for Termination of an Incapacitated Parent?* If the Department does not plead §161.003 as a ground for termination at the beginning of the case, the immediate right to an appointed attorney is not triggered. For example, the Department may not have previous history with the parent and may not yet have results from evaluations identifying a qualifying mental or emotional illness or mental deficiency. In this circumstance, the earliest point in the proceedings at which appointment of an attorney for the §161.003 parent might be raised is the adversary hearing.<sup>21</sup> It is entirely possible that a parent who has a mental or emotional illness or a mental deficiency contemplated in §161.003 may lack sufficient capacity or understanding to invoke the right to counsel. Additionally, as already noted, the right to counsel under § 107.013 does not immediately attach. Even if the § 161.003 parent requests an attorney, she must also establish indigence in order to qualify for an appointed attorney under § 107.013, a hurdle the parent is not required to overcome under section § 161.003.<sup>22</sup> If the parent does not successfully invoke the right to counsel under § 107.013(a), the court may not have a basis to order appointed counsel under § 161.003 until evaluations suggest such an appointment is appropriate. An alternative might be for the court to make a discretionary appointment of counsel if the court has reason to believe, and finds that, the parent is incapacitated.<sup>23</sup>

*Appointment to Represent a Parent:* With some exceptions, based on the court in which the case is filed, the earliest point in the case when you will be appointed to represent a parent is the Chapter 262 adversary hearing held within 14 days after the date the child was taken into possession by the Department, assuming the child has

<sup>16</sup> Tex. Fam. Code § 101.024.

<sup>17</sup> *Id.* §§ 101.024, 160.505(a), 160.601, 160.631(c).

<sup>18</sup> *Id.* § 161.003(b).

<sup>19</sup> *Id.* § 161.003(c).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 262.201.

<sup>22</sup> *Id.* §§ 107.013(a)(1), 107.013(c).

<sup>23</sup> *Id.* § 107.010.

not been returned home earlier.<sup>24</sup> The adversary hearing is also referred to as the “262” hearing or the “14-day” hearing. This is typically the first contested hearing in the case and, therefore, the first time the indigent parent may appear in opposition to the suit.

**» NOTE :** At the adversary hearing, if the court finds that the parent is entitled to an appointed attorney, the court should reset the hearing to allow the appointed attorney to be notified, prepare for the hearing, and appear on behalf of the parent. However, if the Court appoints an attorney who is present in the courtroom at the adversary hearing itself, it is left to the attorney to confer with the parent about whether to proceed or request a continuance.

This manual assumes that the attorney was appointed to represent the parent in time to prepare for the adversary hearing. Even if the attorney is appointed later, much of the material about preparing for the adversary hearing remains relevant in preparing any CPS case. Note that temporary orders are always under the plenary jurisdiction of the trial court, and the attorney appointed to represent a parent may file a motion for further temporary orders if those entered without counsel at the adversary hearing are seriously deficient.

It is at the adversary hearing that the Court will decide whether to return the child(ren) home or issue a temporary order under Chapter 105 of the Family Code.<sup>25</sup> Typically, the Department has already been named the temporary managing conservator of the child(ren) in an ex parte order. If not, the Department will seek appointment as temporary managing conservator at the adversary hearing. The date the Department is appointed the temporary managing conservator begins the running of: (1) the time lines for subsequent hearings and (2) the deadline for reaching permanency under Chapter 263.<sup>26</sup>

*What Are My Duties Once I Am Appointed to Represent a Parent?* With the exception of §107.001(2), the Texas Family Code does not address any special duties and responsibilities to the parent-client.<sup>27</sup> Section 107.001(2) provides that an “attorney ad litem” means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.”<sup>28</sup> Therefore, the duties and responsibilities to the parent-client, are the same as with any other client, and may be found in those provisions of the Texas Disciplinary Rules of Professional Conduct that specify the lawyer’s duties to their client, in the context of the attorney-client relationship and as an officer of the court. (See State Bar Rules, Article X – Discipline & Suspension of Members).

### Information Gathering In Preparation for Client Interview.

Some practitioners conduct extensive information gathering before the initial meeting with, and interview of, their client. This can be a useful “fact-checking” tool if the client, for whatever reason, does not provide complete, or accurate, information. Additionally, preliminary fact gathering often aids the practitioner in discovering information potentially damaging to the client and in formulating questions for the initial client interview. Listed below are the typical collateral sources from which information about the case may be obtained.

*The Court’s File:* You may obtain access to the court’s file if you present a copy of the order appointing you to the district clerk’s office and request the file. If you want copies of the documents in the court’s file, and are court-appointed, the copies should be provided to you without charge. This practice varies from county to county. The court’s file should already contain the Department’s petition, a sworn affidavit, any written orders, returns of service, court appointments, notices of pending settings, and court reports.

<sup>24</sup> *Id.* § 262.201.

<sup>25</sup> *Id.* § 262.201(b), (c).

<sup>26</sup> *See Id.* §§ 263.201(a), 263.304(a), 263.401(a).

<sup>27</sup> Compare *Id.* §§ 107.003, 107.004, 107.0045, 107.006, 107.008, 107.012, 107.0125, 107.016 (relating to appointment to represent a child); with *Id.* §§ 107.010, and 107.013 (relating to representing a parent).

<sup>28</sup> Tex. Fam. Code § 107.001(2).

*The Original Petition:* Each CPS case is initiated with the filing of an original petition, which usually pleads for conservatorship and/or termination of parental rights. The petition includes the names, addresses, birth dates, and social security numbers of the parties, and children, if known. The petition will also recite the grounds for termination on which the Department is proceeding, and the relief sought. The petition should be signed by the Department's attorney, and include the attorney's address, and telephone and facsimile numbers. It is not unusual for the Department to amend its petition as the case proceeds and additional information and facts unfold.

**» NOTE :** If the petition pleads multiple grounds for termination, cross reference the information in the sworn affidavit filed with the petition. This can be useful to determine which grounds for termination alleged in the petition are supported by facts recited in the sworn affidavit. If you are unable to determine the causes of action pleaded or the nature of the controversy from the four corners of the petition, special exceptions may be appropriate. But keep in mind Texas Family Code §161.101 may limit your special exceptions. That statute states “a petition for the termination of the parent-child relationship is sufficient without the necessity of specifying the underlying facts if the petition alleges in the statutory language the ground for termination and that termination is in the best interest of the child.” When a rule of procedure conflicts with a statute, the statute prevails unless the rule is passed subsequent to the statute and repeals the statute as provided by Tex. Gov't Code Ann. § 22.004.<sup>29</sup> One case holding that the statutory allegation did not give fair notice of facts and circumstances relied on for termination,<sup>30</sup> pre-dates Family Code §161.101, which was enacted in 1995.

Also, please see *Garcia v. Texas Dep't of Human Services*, 721 S.W.2d 528, 530 (Tex. App. – Corpus Christi 1986, no writ). As the holding there seems to indicate, if the Department lists several grounds for termination, but fails to plead them in the alternative, it may have to prove all of the grounds plead, rather than one or several, at the time of trial.

*The Affidavit in Support of Extraordinary Relief:* Attached to the petition is an affidavit in support of extraordinary relief, sworn to by the caseworker who investigated the allegations made in the original referral to CPS. The affidavit will include the investigative worker's findings, and will include the following:

*Current CPS Referral: Facts Which Led to the Investigation & Removal:* The caseworker's affidavit will recite the allegations that led the Department to investigate the family and/or remove the children. This will give you an initial idea of the kind of abuse/neglect alleged, and the chronology of events during the investigation that led to removal and/or the decision to petition for conservatorship/termination. The current referral information may also alert you to facts that could result in the filing of criminal charges against your client.

*Is your client the alleged perpetrator?* If not, the children may not have to be removed. The decision to remove the child(ren) may hinge on whether the parent is protective of the child(ren). Did the parent sign a safety plan? Did the safety plan require the parent to keep the alleged perpetrator away from the child(ren)? Did your client violate the safety plan and fail to protect the child(ren) from abuse or neglect

<sup>29</sup> Smith v. Adair, 96 S.W.3d 700, 2003 Tex. App. LEXIS 768 (Tex. App. Texarkana 2003).

<sup>30</sup> Subia v. Texas Dep't of Human Servs, 750 S.W.2d 827, 829 (Tex. App. – El Paso 1988, no writ).

at the hands of another person, such as a violent spouse or partner? If the parent is protective, removal of the alleged perpetrator may be an alternative to removal of the children(ren).<sup>31</sup>

*CPS Referral History:* The affidavit should include any history of previous CPS referrals involving the family, the nature of the allegations in those referrals, the identity of alleged perpetrators and victims, and the ultimate disposition of these previous investigations, including whether your client has previously had his/her parental rights to other children terminated.

*Substance Abuse History:* The affidavit may include information about your client's alleged drug use or substance abuse, if any.

*Domestic Violence Allegations/History:* Are there allegations of domestic violence? Does your client have a history of domestic violence, either as a perpetrator or a victim? Does that history involve your client's current spouse or partner? Has your client applied for or received a protective order due to domestic violence? If so, is the protective order still in effect?

*Criminal History:* Sometimes, the affidavit will include a partial or complete list of previous criminal history of the parent(s) and others. This information may reveal the existence of police incident reports or criminal convictions. It may also reveal whether your client is on probation and whether events have transpired that may trigger a motion to revoke probation, or the filing of criminal charges.

*Is This Case an Aggravated Circumstances Case?* Do the facts in your case support the court making an "aggravated circumstances" finding?<sup>32</sup> Do any of the following criteria apply in your case:

- 1) Was the child the victim of serious bodily injury or sexual abuse inflicted by the parent or with the parent's consent?
- 2) Did the parent engage in conduct against the child that would constitute the offense of: murder; capital murder; manslaughter; indecency with a child; sexual assault; aggravated assault; aggravated sexual assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering the child; prohibited sexual conduct; sexual performance by a child; possession or promotion of child pornography; continuous sexual abuse of a young child or children?
- 3) Did the parent leave the child alone or in the possession of another person not the parent of the child for at least six months without expressing intent to return and without providing adequate support for the child?
- 4) Have the parents' rights to another child been involuntarily terminated based on a finding that the parent engaged in conduct under Texas Family Code §§ 161.001(1)(D) or (E) — the abuse or neglect termination grounds?
- 5) Has the parent been convicted of: a) the murder of another child of the parent; b) the voluntary manslaughter of another child of the parent; c) aiding and abetting, attempting, conspiring or soliciting an offense under (a) or (b) above; d) felony assault of the child or another child of the parent that resulted in serious bodily injury to the child or another child of the parent? or,

If any of these circumstances apply or are alleged, the court may make an "aggravated circumstances" finding.<sup>33</sup> What does that mean for the parent against whom the finding is made? If the court finds that the parent has subjected the child to aggravated circumstances, the court may waive the requirement of a service plan and the requirement to make reasonable efforts to return the child to a parent. The court may also accelerate the trial schedule to result in a final order for a child.<sup>34</sup>

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<sup>31</sup> *Id.* § 261.1015.

<sup>32</sup> *Id.* § 262.2015.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 262.2015(a).

*Have you been appointed to represent both parents?* If so, does any of the information you have reviewed suggest a conflict exists in representing both parents? If the answer to this question is yes, you may need to file a motion to withdraw from representation of one or both parents.

*Read the Ex Parte Order:* The ex parte order will include the date the Department was appointed temporary managing conservator, boilerplate temporary orders, the identity of the attorney and/or guardian ad litem appointed to represent the children the subject of the suit, the date set for the initial hearing in the case, the date the order was signed and the name of the judge signing the order.

*Did the Department do an “Emergency Removal?”* Did the Department remove the child from the home without a court order (emergency removal)? If so, were the criteria in *Gates* followed?<sup>35</sup> If not, legal remedies might be available to your client if his/her fourth amendment rights have been violated.<sup>36</sup> Were required timelines followed? If not, is your client entitled to the return of her child(ren)?<sup>37</sup>

*Read the Court Report Prepared for the First Hearing (Adversary Hearing):* The court report will contain information obtained about the department’s case since the filing of the original affidavit in support of extraordinary relief. It also contains the Department’s recommendations for the adversary hearing.

### People With Information About the Case

*The Department’s Attorney:* He/she may or may not be the attorney who signed the petition. The Department’s attorney is usually willing to discuss the relief the Department will request at the adversary hearing. If you want to contact the Department’s caseworker to interview her regarding the affidavit and investigation, confirm that the Department’s attorney does not object to you communicating with his/her client.

*The Caseworker:* The caseworker may be able to provide contact information for your client, other family members, witnesses, or others identified in the affidavit. The caseworker can tell you if your client has signed any documents, and may know if the child made an outcry, and if so, to whom it was made. The caseworker may also know if the child had, or will have, a Child Advocacy Center (CAC) videotaped interview.<sup>38</sup>

If a child required medical treatment as a result of the alleged abuse or neglect, the caseworker should know the identity and contact information for the hospital and treating physician.

The caseworker may be willing to discuss her investigation, including efforts to prevent the removal of the child, anticipated recommendations at the adversary hearing, such as whether CPS will recommend the child(ren)’s return to a parent, relative, or an alternate placement, and the basis for the recommendations. In conjunction with placement recommendations, the caseworker may share contact and other information regarding possible relative placements.

**» NOTE : CPS must provide the parent with a “child placement resources form” for use in investigations of child abuse. In cases where the child is removed, the caseworker is required to have the parent fill out the form to identify possible placement options for the child. The caseworker should know if your client has completed a child placement resources form.**<sup>39</sup>

*The Attorney Ad Litem for the Child:* The attorney ad litem for the child (AAL) will conduct an independent investigation of the facts to the extent he/she deems necessary and will make recommendations at the adversary

<sup>35</sup> See *Gates*, 437 F.3d 404 (5th Cir., July 28, 2008) (qualified immunity that shields government officials from personal liability may be pierced when conduct violates clearly established statutory or constitutional law which a reasonable person would have known).

<sup>36</sup> *Id.*

<sup>37</sup> Tex. Fam. Code §262.106c.

<sup>38</sup> See *id.* §§ 261.302(e) and 264.408(e).

<sup>39</sup> The blank form is available upon request from CPS. Ask for Form 2625, referenced in the CPS Handbook, Substitute Care Services, §6121.3. The form may also be available on the CPS website: [http://handbooks.tdprs.state.tx.us/site\\_map/forms.asp](http://handbooks.tdprs.state.tx.us/site_map/forms.asp).



hearing regarding the return of the children, placement, visitation, child support, and other matters; and the basis for these recommendations.<sup>40</sup> The AAL usually does not file a court report. Contact the AAL before the hearing to find out recommendations the AAL will make.

CASA: Once appointed, the CASA will conduct an independent investigation at each stage of the case and will make recommendations regarding what he/she believes to be in the best interest of the child.<sup>41</sup> If the CASA is appointed as Guardian Ad Litem, the parent's attorney should review the powers and duties set out in the Family Code. If the court has appointed CASA only as a "volunteer advocate" the parent's attorney should consult CASA standards and local practice to clarify the roles and responsibilities of the volunteer. The parent's attorney should also consider whether the child's attorney, if remaining in the "dual role," may ethically continue as both the child's attorney and guardian ad litem.

**» NOTE : For all practical purposes, CASA is almost never appointed before the adversary-hearing. Once CASA is appointed, the CASA volunteer typically files a written report to the court before each court hearing that includes CASA's case-related contacts, activities, and recommendations.**

### Meeting your Client

Confidentiality: Not all attorney-client communications are privileged from disclosure.<sup>42</sup> When you discuss with your client the parameters of confidentiality in the attorney-client relationship, remember the exceptions that require you to disclose certain information to others.

Duty to Report Abuse or Neglect: If a person has cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person, she must immediately make a report.<sup>43</sup>

A professional who has cause to believe that a child has been abused or neglected, or may be abused or neglected, or is a victim of an offense under Texas Penal Code § 21.11, or has been abused as defined by § 261.001 or 261.401, has a mandatory duty to make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Texas Penal Code § 21.11.

A professional may not delegate to, or rely on, another person to make the report.<sup>44</sup> The term "professional" means a individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, daycare employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.<sup>45</sup>

The requirement to report applies without exception to an individual whose personal communications may otherwise be privileged, *including an attorney*, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.<sup>46</sup>

**» NOTE : The duty to report does not include a requirement to identify yourself as the reporter.**

<sup>40</sup> See Tex. Fam. Code § 107.003.

<sup>41</sup> See Tex. Fam. Code § 107.002.

<sup>42</sup> See Tex. Fam. Code § 261.101 (persons required to report abuse or neglect); Subchapter C, Chapter 48, Human Resources Code; State Bar Rules, Article X, Rules 1.05, 3.03(a)(2) & (b), and 4.01(b).

<sup>43</sup> Tex. Fam. Code § 261.101(a).

<sup>44</sup> *Id.* § 261.101(b).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 261.101(c)(emphasis added).



*You may not be compelled to testify against your client:* The duty to report does not include a duty to testify. Attorney-client communications still enjoy a testimonial privilege.<sup>47</sup>

*It is an offense to fail to report:* A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report. An offense under this section is a Class B misdemeanor.<sup>48</sup>

*It is a criminal offense to make a false report:*<sup>49</sup> It is a state jail felony to knowingly make a false report with the intent to deceive. The offense is enhanced to a felony of the third degree, if it is shown on the trial of the offense that the person has previously been convicted of making a false report.<sup>50</sup>

### Interviewing Your Client If you Represent the Mother

Below are some subject-matter categories about which your client may provide information relevant to the case.

*The Affidavit of Status (§ 161.105):* If the case was filed before September 1, 2007, and the child has no presumed, adjudicated, or acknowledged father, your client may have been asked to execute an affidavit of status identifying the alleged father(s) of her child(ren) and other information relating to the paternity of the child(ren).<sup>51</sup>

**» NOTE : Section 161.105 was repealed effective September 1, 2007.<sup>52</sup> Therefore, for cases filed on or after September 1, 2007, an affidavit of status is no longer required. Reportedly, some jurisdictions still utilize affidavits of status.**

*Has your client ever been married?* Obtain the dates and locations (city, county, state) of each marriage, and the name(s) of each husband(s).

*Has the mother ever divorced or sought child support?* From who, in what year, in which county and state, in what cause number, under what names? There may be a court of continuing jurisdiction.<sup>53</sup>

*How many biological and adopted children has your client had?* What are their names and dates of birth? Where were they born? Does she have custody of them; if not, why not? With whom are the children living? Have the mother's parental rights to any child ever been terminated or relinquished?

*Is there a presumed father?* Was any child born before or during a marriage; or within 301 days after the marriage is terminated? Did the mother marry after the birth of a child and her husband assert his paternity of the child as per Texas Family Code §160.204? During the first two years of the child's life, did a man continuously reside in the household in which the child resided and represent to others that the child was his own?<sup>54</sup>

*Is there an acknowledged father?*<sup>55</sup> Acknowledgments are filed with the Bureau of Vital Statistics.<sup>56</sup>

*Is there an adjudicated father?*<sup>57</sup> If yes, there may be a court of continuing jurisdiction.<sup>58</sup> The most common situation is an existing child support case involving the child. Does your client have a copy of the order adjudicating parentage and/or ordering child support?

Do you know your client's name, including current legal name, maiden name, and any alias she has used? This information is relevant to your client's CPS and criminal history, if any.

<sup>47</sup> *Id.* § 261.202; Tex. R. Evid. 503. (subject of course to those exceptions found in the Texas Disciplinary Rules of Professional Conduct 1.05, 3.03(a)(2), 3.03(b), 4.01(b)).

<sup>48</sup> Tex. Fam. Code § 261.109.

<sup>49</sup> *Id.* § 261.107.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* § 161.105.

<sup>52</sup> H.B. 3997, § 13, 80th Leg., eff. Sept. 1, 2007).

<sup>53</sup> See Tex. Fam. Code §§ 155.001 et seq.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* §§ 160.301 et seq.

<sup>56</sup> *Id.* § 160.305.

<sup>57</sup> *Id.* §§ 160.601 et seq.

<sup>58</sup> See *id.* §§ 155.001 et seq.

## Interviewing your client if you represent the Father

*Is your client an alleged, presumed, acknowledged, adjudicated or unknown Father?*<sup>59</sup> Different substantive and procedural provisions are triggered based on paternal status.<sup>60</sup>

*Does your client want to:* sign a waiver of interest,<sup>61</sup> adjudicate paternity,<sup>62</sup> execute an acknowledgment of paternity,<sup>63</sup> or deny paternity?<sup>64</sup> Does he want a paternity test?<sup>65</sup>

*Is your client an alleged father?* Was he served with citation? Has he appeared or answered? Did he timely file an admission of paternity or a counterclaim for paternity? The State's burden in terminating his rights will vary depending on the answer to these questions.<sup>66</sup>

*Is your client an unknown father, or an alleged father whose whereabouts are unknown?* Did he register his intent to claim paternity of the child(ren)? If he did not, his rights as a parent, whatever they may be, are subject to termination based on that failure alone. He need not be personally served, or cited by publication, and there is no requirement to try to identify or locate him.<sup>67</sup>

*Is or was your client ever married to the respondent mother in the case?* What are the dates of the marriage? Were any children born of the marriage? If your client was not married to the mother, but fathered a child by her, has paternity been established as to each such child? How (court order, acknowledgment)? Has there been a previous court case in which orders concerning the child(ren) were rendered?

**» NOTE :** If the alleged father files a pleading admitting paternity or swears he is the father during a hearing, and the court finds there is no reason to question the admission, he can be adjudicated to be the father.<sup>68</sup> In part because the process is so simple and controlled by the scientific evidence, there is no statutory or constitutional right to a court-appointed and county-funded attorney in a paternity establishment case.<sup>69</sup> Jury trials are prohibited, so adjudication of paternity is strictly a matter for the court.<sup>70</sup> A court may adjudicate paternity at any hearing, and once the man is adjudicated to be the father he has the rights and duties of a parent, including the right to possession of or access to the child.<sup>71</sup> This also means that the Department must prove "grounds" to terminate his parental rights.

## Other Client-Interview Matters

*Has an Out-of-State Court Exercised Jurisdiction Over the Child?* If a Texas court does not have jurisdiction to make an initial child custody determination, or is not a court of continuing jurisdiction, you must consult the Uniform Child Custody & Jurisdiction Enforcement Act (UCCJEA) regarding procedural and substantive provisions for determining the State court with jurisdiction over the child(ren) to render temporary and permanent orders.<sup>72</sup>

<sup>59</sup> *Id.* §§ 101.0015, 160.102(13), 101.0010, 160.102(1).

<sup>60</sup> *See id.* §§ 160.001 et seq.; 160.606, 160.607, 161.002, 161.106, 161.109, 160.204, 262.201(f).

<sup>61</sup> *Id.* § 161.106, 161.204.

<sup>62</sup> *Id.* §§ 160.102(1), 160.601 et seq.

<sup>63</sup> *Id.* §§ 101.0010, 160.301–312.

<sup>64</sup> *Id.* § 160.303, 160.312.

<sup>65</sup> *See id.* §§ 160.501 et seq.

<sup>66</sup> *See id.* §§ 101.0015, 160.623, 161.002(b)(1).

<sup>67</sup> *Id.* §§ 161.002(b)(2)–(4), (c), (d), (e), (f).

<sup>68</sup> Tex. Fam. Code § 160.623.

<sup>69</sup> *Blake v. Blake*, 878 S.W.2d 209, 212 (Tex. App. – Corpus Christi 1994, pet. denied).

<sup>70</sup> Tex. Fam. Code § 160.632.

<sup>71</sup> *Id.* § 160.624(b).

<sup>72</sup> Tex. Fam. Code § 152.101 et seq.

*Consents to Release of Information:* Psychologists, counselors, school officials, and other professionals will not talk to you until they have a copy of an authorization for the release of information from your client, and sometimes a copy of the order appointing you. Has your client signed an authorization for third parties to release information to, and communicate with, you? Additionally, because of the 1996 Health Insurance Portability & Accountability Act (HIPAA), third parties may require your client to complete one of their in-house releases developed to comply with HIPAA privacy laws (Public Law 104-191) before the third party will release information, or talk to you. Further, CPS frequently asks parents to sign a CPS consent form for the release of information. Be sure to familiarize yourself with the CPS release.

*Client Contact Information:* It is not uncommon for parents in CPS cases to change residences and phone numbers during the legal case. Have you obtained your client's current contact information? Have you asked the client to maintain regular contact with you?

*Identity of All Household Members:* Household members may be subject to CPS background checks for criminal & CPS history. Do any of the household members have CPS or criminal histories? The presence of “inappropriate” individuals in the home can affect efforts to return a child or children to the home.

*Relative Placement Options:* In most instances, your client will want the children returned home. Failing that, he/she may want the children placed with the other parent, or a relative.<sup>73</sup> Where does the client want the children placed if they are not returned to the parent? Has the caseworker done a criminal history and CPS background check on this person?<sup>74</sup>

**» NOTE :** The 81st Legislature amended Texas Family Code § 262.114, to require the Department to file with the court at the adversary hearing all copies of completed home studies, and the name of the relative or other designated care giver with whom the child has been placed, if any.<sup>75</sup> If the child has not been placed with a relative or other designated care giver by the time of the adversary hearing, the Department shall file with the court a statement explaining why and the actions the Department is taking, if any, to place the child with a relative or other care giver.<sup>76</sup>

*Child Placement Resources Form:* If the parent has not already done so, the Court will require each parent, alleged father, or relative of the child to submit a “child placement resources form” to help identify possible relative placement options.<sup>77</sup>

**» NOTE :** Section 262.114(b) allows the Department to place a child with a relative or other designated individual identified on the proposed child placement resources form before conducting the background and criminal history check or a home study.<sup>78</sup> Despite § 262.114(b), courts are reluctant to place a child in the absence of at least a CPS and criminal history background check, and have the discretion to decline to do so.

The Family Code provides for financial assistance to relatives or other care givers who step forward to have a child placed with them:

<sup>73</sup> See *id.* § 262.201(e) (mandating that Court place removed child with non-custodial parent if appropriate; or with a relative unless to do so is not in child's best interest).

<sup>74</sup> *Id.* § 262.114.

<sup>75</sup> Tex. Fam. Code §§ 262.114 (a-1)(1),(2),(3), as amended by S.B. 2385, 81st Leg., R.S. (2009).

<sup>76</sup> Tex. Fam. Code §§ 262.114 (a-2)(1),(2), as amended by S.B. 2385, 81st Leg., R.S. (2009) [Effective September 1, 2009].

<sup>77</sup> See *id.* §§ 262.201c and 261.307.

<sup>78</sup> *Id.* §§ 262.114(b); but see Tex. Fam. Code §§ 262.114(a), 264.753, & 264.754 (background and criminal history checks prerequisites to placement).

*Care Giver Assistance Program:* Relatives, and designated care givers are eligible for financial assistance, based on need.<sup>79</sup> Available assistance includes a one-time cash payment of not more than \$1000 to the care giver on the initial placement of the child or sibling group (per child), for the purchase of essential child care items.<sup>80</sup> The care giver may also receive reimbursement of other expenses not to exceed \$500 per year for each child.<sup>81</sup> Other support services may also be available.<sup>82</sup>

Additionally, the Family Code has been amended, adding § 264.760, which provides that a relative or other designated care giver who becomes licensed by the Department or verified by a licensed child-placing agency or the Department to operate a foster home, foster group home, agency foster home, or agency foster group home may receive foster care payments beginning the first month in which the relative or other designated care giver becomes licensed or is verified.<sup>83</sup>

*Permanency Care Assistance Program:* A kinship provider<sup>84</sup> may be eligible to receive monthly payments from the Department (permanency care assistance benefits) under a permanency-care-assistance agreement. The kinship provider must be a prospective managing conservator of a foster child and the monthly assistance cannot exceed the amount of monthly foster care maintenance the Department would pay to a foster care provider caring for the child.<sup>85</sup> The Department is currently developing the parameters of this program, which is due to roll out in late 2010.

*Symbolic Relatives or Fictive Kin:* Sometimes the parent can name a person who is not related by blood or marriage, but who has been a care giver for the child(ren), or has a bond with the child(ren), and is willing to have the child(ren) placed with them, such as godparents, coaches, teachers, or neighbors. Courts will consider such placements if it can be shown to be appropriate and in the child's best interest.

*What is your client's account of events?* Have you reviewed with your client, the statements in the Affidavit in Support of Extraordinary Relief and the Court Report? Your client may provide very different or additional facts relating to the current referral and investigatory facts recited in the affidavit and court report. Your client may provide information not found in either document that will bear directly on the issue of the return of the child or placement with a particular individual.

*Housing:* What is your client's housing history since the birth of the oldest child? Does your client currently have stable housing? Are you familiar with the housing resources available in your community through county or city public housing authorities and the like?

*Employment:* Is your client employed? What is the employer's name, address and telephone number? What income does the client bring home each week or month? What monthly bills must the client pay? What is the client's work schedule? Can your client provide employment history since the birth of the oldest child? Is your client currently paying child support for any child?

*Public Assistance/Governmental Entitlement:* Is the client receiving public assistance or governmental entitlement, such as food stamps, public housing, or disability income? Will placement of the child(ren) outside the home affect the client's eligibility for any of these benefits (will the client lose food stamps or housing)?

*Mental Health/Mental Retardation (MHMR):* Does your client have a history or diagnosis of mental illness or a diagnosis of mental retardation or borderline intellectual functioning? Does your client take any psychotropic medications? Is the client taking any medications which have not been prescribed to them (is the client abusing prescription medication)? Is the client supposed to be taking medication but non-compliant? Can the client provide the names and contact information for the treating psychiatrists, psychologists, or therapists that have worked

<sup>79</sup> Tex. Fam. Code § 264.755(a).

<sup>80</sup> *Id.* at § 264.755(b).

<sup>81</sup> *Id.* at § 264.755(c)(6).

<sup>82</sup> See Tex. Fam. Code § 264.755(c)(1–5).

<sup>83</sup> Tex. Fam. Code § 264.760, as amended by H.B. 1151, 81st Leg., R.S. (2009) [Effective September 1, 2009].

<sup>84</sup> A relative or other adult with a longstanding and significant relationship with a foster child before the Department placed the child with the person and with whom the child resides at least six consecutive months after the person becomes licensed by the Department or verified by a child placing agency or other Department to provide foster care. Tex. Fam. Code § 264.851(2).

<sup>85</sup> Tex. Fam. Code §§ 264.851 et seq., as enacted by H.B. 1151, 81st Leg., R.S. (2009) [Effective September 1, 2009].

with the client? Does this history or diagnosis of mental illness, mental retardation, or borderline intellectual functioning impact your client's ability to effectively parent?

*Is your client disabled?* Is your client entitled to reasonable accommodations in the provision of services?<sup>86</sup>

*Does your client speak or understand English? Is your client hearing impaired?* Will the client require modifications to the standard services offered, or special accommodations at all hearings or in communications with the attorney (such as an interpreter or translator)? Have you, or has someone else, made arrangements to accommodate your client's special needs?

*General Health Status:* Does the client suffer from a medical condition or disease for which he/she receives or is supposed to be receiving treatment and or medication? Is the client receiving said treatment or medication? Do you have the names and contact information of treatment providers? Does this medical condition or disease impact your client's ability to effectively parent?

*Previous CPS History:* In all likelihood, the Department has your client's entire CPS history for Texas. Review this history with your client. Do you know whether your client has any other child-abuse or child-neglect referrals, investigations, FBSS cases, or legal cases outside the state of Texas?

*Domestic Violence:* Is the parent currently married or involved in a domestic relationship? Is there a history of domestic violence? Has the client ever obtained a protective order? When? Against who? Do you think your client may need a protective order now? Should her address be kept confidential? How do you keep it out of the court reports that the caseworker prepares? Do you know, and can you advise your client, about available resources in the community for victims of domestic violence?

**» NOTE :** If your client is involved in an abusive relationship, the perpetrator's control over your client may impact your attorney-client communications, your client's cooperation with you, your client's participation in services, and more. Is your client financially dependent on the perpetrator? Is your client isolated from any outside support network, such as relatives, friends or other community support? Is your client dependent on the perpetrator for transportation? Has the perpetrator threatened to harm the victim and/or the children if the victim attempts to leave? Have you considered whether special precautions should be taken at court hearings, and in meeting with your client?

*Drug Use:* Does your client have a drug or alcohol abuse problem? What is your client's treatment history? Which drug(s) are abused? Are there criminal charges pending relating to drug use or alcohol abuse?

*Criminal History:* Have the police ever been called to the client's home? Has the client provided you with details relating to such incident(s)? Has the client ever been arrested? What was the charge? In what year did the arrest occur? Has the client ever pleaded to a charge or been convicted of a crime? When? Where? What was the offense? What was the punishment? Did the client comply with all punishment/sentencing/probation terms imposed by the court?

Does the client have any criminal charges pending? Has the client been indicted? Are any charges pending or anticipated that are related to the abuse and neglect allegations in the current CPS case? Does the client have a criminal attorney?

*Fifth Amendment privilege against self-incrimination:* If your client is, or may be, subject to criminal prosecution, your client has the right to invoke a Fifth Amendment privilege against self-incrimination if he/she reasonably fears the answer sought to a question may be incriminating.<sup>87</sup> In a civil case, the parent may not

<sup>86</sup> See 42 U.S.C.S. § 12101 et. seq. (P.L. 101-336) (Americans With Disabilities Act) (1990).

<sup>87</sup> *Ex Parte Butler*, 522 S.W.2d 196, 198-99 (Tex. 1995, orig. proceeding).



make a blanket assertion of the Fifth Amendment.<sup>88</sup> The privilege against self-incrimination must be asserted on a question-by-question basis.<sup>89</sup> The fact finder may draw an adverse inference against a parent who asserts the Fifth Amendment privilege in a parental-rights termination proceeding.<sup>90</sup>

*Support Network:* Does the client have family or friends in the area? Does the client have a good relationship with any of these people? Will they provide the client with help if needed? Does the client have access to any community resources? What are they?

*Client's Goals:* The court will decide whether the children should be returned to the parent; or will make appropriate temporary orders. With this in mind, what are your client's goals? Are they realistic given the apparent facts in the case? In discussing client goals, is it prudent to prepare alternative requests for relief should the client's primary request be denied? If you have done your homework before meeting with your client, you can provide some reality testing relating to your client's goals and expectations for the adversary hearing.

*Determine whether your client wants a contested Adversary Hearing:* The client may want a contested adversary hearing on one or all of the issues of conservatorship, the children's placement, or requested services. Will the outcome of a contested adversary hearing be beneficial or detrimental to your client?

*If the child is not returned at the Adversary Hearing, what visitation will you request?* What kind and amount of visitation does your client want with the children? The options available to the client will depend in part on with whom the child is placed. If the child is in foster care and only visits supervised by the Department are authorized, the frequency and duration of parent/child visits may be limited by the availability of a CPS employee to supervise the visit. Similarly, the opportunities for visits may be limited to normal weekday business hours. Initially, there may be little that can be done to increase the frequency of visitation, but visitation is one of the most critical issues for a parent, especially if the children involved are young or an infant.

If the child is placed with another parent, a relative or a symbolic relative, additional supervised visitation may be an option, depending on the facts in the case and on the placement's willingness and ability to supervise visits.

Distance will also impact frequency of visitation. If a child is placed out of town, county or state, the time needed to travel to a visit as well as the availability of transportation can impact the parent's ability to visit with the child.

The child's special needs may also affect the frequency and duration of visits. Parent-child visits may be more restricted when a child is medically fragile, or has specialized needs requiring a specific environment and readily available supportive equipment or trained personnel.

What if the child states she does not want to see the parent? Courts weigh the child's expressed desires. How will the court determine whether complying with the child's expressed wishes is in the child's best interest? How will the permanency plan influence this assessment (for example, if reunification is the goal)? How will you prepare to address these issues?

*Review the recommended services in the Court Report:* Generally, most CPS legal cases start out with the plan of reunifying the family, by providing services designed to address the concerns that led to the Department's involvement in the first place. If the child(ren) is not returned to the parent at the adversary hearing, the parent is usually court-ordered to participate in services. When the plan is reunification, the parent(s) must be able to demonstrate the ability to provide a safe home to which the child(ren) can be returned. The adversary hearing is the first hearing at which the Department may request that the court order preliminary services for the parent, although this is usually formally reserved for the Status Hearing.<sup>91</sup>

*Before you conclude your meeting with your client:* Have you explained the timelines in the case? The client should know that the Court has until the first Monday after the first anniversary of the temporary order naming the Department as temporary managing conservator to resolve the case. What is the dismissal date in your case?

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<sup>88</sup> *In re Verbois*, 10 S.W.3d 825, 828 (Tex. App. – Waco 2000, orig. proceeding).

<sup>89</sup> *In re Butler*, 522 S.W.2d at 197-98; *In re Verbois*, 10 S.W.3d at 828.

<sup>90</sup> *In the Interest of C.J.F.*, 134 S.W.3d 343, 352-353 (Tex. App. – Amarillo 2003, pet. denied); see also, *Dept. Of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995) (civil jury may draw negative inference against a party who asserts privilege against self-incrimination).

<sup>91</sup> Tex. Fam. Code §§ 263.201, 263.202(b).

» **NOTE :** Many parents hear “one-year deadline” and assume they have a full year to comply with the court’s orders. Not so. Often, the case will be set for trial months in advance of the dismissal deadline.

Have you provided your client with your contact information? Does your client know the date, time, and location for the next hearing?

### Additional Preparations for the Adversary Hearing

*Pleadings:* Should you file an answer? That depends on who you represent. Do you represent a client who was served by publication and has never appeared in person or by an attorney of his own selection?<sup>92</sup> In the absence of any post-judgment motions or request for findings of fact and conclusions of law, the parent served by publication, who did not appear or answer, may have up to six months to perfect an appeal, as opposed to twenty days.<sup>93</sup>

*Do you need a continuance?* Do you need time to interview and subpoena witnesses for the adversary hearing?

*Affirmative Defenses or Counterclaims:* Based on your preparations and interviews, are there any affirmative defenses, counterclaims, or other affirmative relief for which you need to plead?

*Untimely Adversary Hearing:* What if the adversary hearing is not held within fourteen days of the date the Department took possession of the child?<sup>94</sup> At least two courts of appeals have held that the requirement to hold the adversary hearing within fourteen days of the date the Department took possession of the child is not jurisdictional.<sup>95</sup>

*Parties Entitled to Documents:* If you file or serve any pleadings or documents, remember to include the guardian ad litem (typically CASA) if one has been appointed.<sup>96</sup>

*Interview Possible Placement Options:* Interview those persons identified as possible placement options. Are they interested in the children being placed with them? Do they have criminal or CPS history? What kind of housing do they have? Are other children in the home? Is there room for additional child(ren)? What will the sleeping arrangements be? Where will the child(ren) go to school? Is day care available? Does the placement have the financial resources to support additional children? How long will the person(s) interested in placement be willing to serve as a placement for the child(ren)? Will the person(s) interested in being a placement for the children attend the hearing? Has the caseworker contacted the prospective placement? Has the caseworker performed a criminal and CPS background check before the adversary hearing?

» **NOTE :** If you anticipate any out-of-state placements, the Interstate Compact on the Placement of Children (ICPC) should be consulted.<sup>97</sup> In cases in which the ICPC applies, Courts are not free to make out-of-state placements in the absence of the approval of the state that will be receiving the child.<sup>98</sup> While the ICPC helps “receiving” States hold “sending” states financially responsible for the children they are sending, it adds months to the process of achieving placement or permanency for the child, even when the intended placement is with an appropriate non-custodial parent or blood relative, and in the child’s best interest.

<sup>92</sup> Compare Tex. R. Civ. P. 329(a), with Tex. Fam. Code § 161.211.

<sup>93</sup> Compare Tex. R. App. P. 26.1c, 30 (restricted appeals) and Tex. Fam. Code § 161.211(b) (deadline for direct or collateral attack); with Tex. Fam. Code § 263.405(a) and Tex. R. App. P. 26.1(b) (accelerated appeal).

<sup>94</sup> Tex. Fam. Code § 262.201(a).

<sup>95</sup> *In re J.W.M.*, 153 S.W.3d 541, 545 (Tex. App. – Amarillo 2004, pet. denied); *In the Interest of B.T.*, et. al. 154 S.W.3d 200, 208 (Tex. App. – Fort Worth 2004, no pet.).

<sup>96</sup> Tex. Fam. Code § 107.002c (CASA entitled to copies of all pleadings, papers filed with court, notice of each hearing, agreed orders).

<sup>97</sup> *Id.* § 162.101et. seq.

<sup>98</sup> ICPC, § 161.102, Article III, subsection (d).



*Possible Witnesses for the Adversary Hearing:* Have you notified your witnesses of the date, time, and place for the hearing? Have you subpoenaed witnesses for the adversary hearing?

*Communications with the other parties, children's attorney & CASA:* Remember that the AAL & CASA are conducting their own investigations into the facts. If you have information that is helpful to your client's position (i.e. return of the children, an appropriate placement option, and unsupervised visits) do the AAL and CASA know about it?

**» NOTE :** If the information was obtained from your client, such communications are deemed attorney-client privileged. Has your client consented to the disclosure of this information to enumerated third parties and the resulting waiver of the privilege as to that information?

### Legal Representation at the Adversary Hearing

*Informal Agreements:* In many cases, the parties hammer out agreements for the temporary orders at the adversary hearing, usually outside the court room, immediately preceding the hearing. In your meeting with your client, have you discussed to which recommendations he/she is willing to agree, as well as matters he/she wishes to contest? Are you prepared to negotiate with the other parties before standing in front of the judge? Often, partial or complete agreements can be worked out ahead of time.

If a full agreement is not reached, the unresolved issues are typically presented to the Court. In some counties, this may mean a contested hearing on the unresolved issues. In others, an informal process, called the "semicircle of justice," may be used whereby parties and/or their attorneys make their arguments regarding the unresolved issues while standing before the judge. At the conclusion of the hearing, the Court will make the orders it deems appropriate.

*Contested Adversary Hearing:* Any party may demand a fully-contested adversary hearing, conducted pursuant to formal rules of evidence and procedure, after which the Court will render its orders. Depending on time announcements, the Court may set the contested 262 for another day, to allow sufficient time for the hearing.

**» NOTE :** There are pros and cons to a contested hearing. The court may render orders that give your client less favorable relief than he/she might otherwise have obtained through agreed orders. On the other hand, some practitioners use a contested adversary hearing to discover and test the Department's witnesses and evidence.

*The Adversary Hearing Order:* When the judge announces a decision at the conclusion of the adversary hearing, a written order is routinely prepared and signed in the courtroom. Did you review the order before signing, or allowing the client to sign, the order?

*De novo review:* Did an associate judge preside at the adversary hearing? If the associate judge's recommendations are adverse to your client, you may request that the referring court (a district judge) conduct a de novo review of the associate judge's recommendation.<sup>99</sup>

*Form of Request for de novo review:* The request for a de novo hearing must be in writing and filed with the referring court and the clerk of the referring court.<sup>100</sup>

<sup>99</sup> Tex. Fam. Code § 201.015. For an idea of the scope of de novo review, see Tex. Fam. Code §§ 201.015(b), (c), which was amended in the last legislative session. [H.B. 2501, effective September 1, 2007].

<sup>100</sup> Tex. Fam. Code §§ 201.015(a), 201.2042 [as amended by H.B. 2501, effective September 1, 2007].

*Time is of the essence:* The period within which to request a de novo review is not later than the seventh working day after the date the party receives notice of the substance of the associate judge's report.<sup>101</sup>

*Notice of the associate judge's report:* The associate judge's report must be in writing in the form directed by the referring court. After a hearing, the associate judge shall provide the parties participating in the hearing notice of the substance of the associate judge's report, including any proposed order.<sup>102</sup>

A party's failure to request a de novo review before the referring court or a party's waiver of the right to request a de novo review before the referring court does not deprive the party of the right to appeal to, or request other relief from, a court of appeals or the Texas Supreme Court.<sup>103</sup>

*The Motion for Further Orders:* If a matter arises that requires the court's attention before the next scheduled hearing, you can file an appropriate motion for further orders and set it for hearing. The better practice is to confer with all counsel and unrepresented parties regarding setting the hearing before you actually obtain a setting. In some counties, the failure to confer is sanctionable under the local rules.

### The Status Hearing

Following the adversary hearing, the next statutorily required hearing is the status hearing, also known as the "60-day hearing." It is set no later than 60 days after the date the court rendered a temporary order appointing the Department temporary managing conservator of the child(ren).<sup>104</sup>

The status hearing is not a second opportunity to re-litigate the removal of the children or the findings made at the adversary hearing. In the absence of any motions set for hearing, the status hearing focuses on the child's status, ordering appropriate services for the family, making temporary orders as to conservatorship and placement, and visitation issues.

**» NOTE :** Practice varies from court to court, but other matters that may be taken up at the adversary or status hearings include pre-trial scheduling orders and discovery-control-plan orders. Additionally, the court will consider new evidence raised at the status hearing regarding placement options for the child.

### Preparing for the Status Hearing

If the children were not returned at the adversary hearing, and the court did not make an "aggravated circumstances" finding, the single most important predictor of whether your client will be reunified with the child(ren) is the client's successful participation in court-ordered services. In this regard, the outcome of the case is, in many respects, in your client's hands.

Nonetheless, there are multiple ways in which your counsel and preparations can affect the parent's prospects for success. For example, the parent's attorney can troubleshoot potential impediments to the client's progress with services.

*Service Plans:* From the standpoint of the attorney representing Respondent parents, the contents of the Service Plan may be one of the most important elements of the case. If it is realistic and not overly burdensome, parents may be able to prepare to have the children returned. If on the other hand, there is little possibility of success, the parents will clearly fail and may result in restricted or termination of parental rights.

Section 263.102 of the Texas Family Code sets forth what must be in the Service Plan. The plans are required to be in writing. They must be clear and understandable. In addition, they must be written in a language that the

<sup>101</sup> *Id.* § 201.015(a) [as amended by H.B. 1995, effective September 1, 2007].

<sup>102</sup> *Id.* § 201.011. [effective for SAPCRs filed on or after September 1, 2007].

<sup>103</sup> *Id.* §§ 201.016 [as amended by H.B.2501, effective September 1, 2007].

<sup>104</sup> *Id.* § 263.201.

parents understand. The plan which is prepared by DFPS should be developed in conference with the parents, assuming of course, the parent's cooperation.

The Service Plan must state what the ultimate goal will be either return to the parents, termination of parental rights, or continuation of the child's care outside of the home.

The Service Plan must clearly state any deadlines under the plan and it should state the steps the parents should take in order to have the child returned from foster care. If the child is already home, but under DFPS's supervision, the plan should clearly describe the steps necessary to keep the child at home. The plan should not only lay out the parent's responsibility and the action that they need to take, but also the assistance that DFPS plans to provide to the parents. If the parents need to acquire new skills or knowledge that should be spelled out in the plan as well as what behavioral changes must be made to achieve the goals in the plan. If applicable, the plan should state the steps the parents need to take to make sure the child attends school. The plan should also identify the individual at DFPS that the parents may contact.

The plan must include the statutory warning to parents about the consequences of non compliance with the plan.<sup>105</sup> Non-compliance with the plan can be grounds for termination.<sup>106</sup>

If the parents do not live in the same household and refuse to cooperate with each other and CPS in putting together the Service Plan, CPS has the discretion to choose one parent's home over the other.

Federal law requires that CPS give all parents some family reunification services and adoption promotion and support services. Even if the plan is for termination, under federal law, CPS must provide some family reunification services and if the plan is for the return of the child to the home, they will still provide adoption promotion and support services.

**» NOTE :** If you have a case in which the court made a finding of "aggravated circumstances", the Court will dispense with a status hearing, waive the requirement for a service plan, and instead conduct the first permanency review hearing within 30 days of the date it made the aggravated circumstances finding.<sup>107</sup> In other words, the case is on a fast track toward termination. If this is the case, trial related matters take precedence.

*Review the Service Plan:* The Family Code requires the parent and Department representative to review the plan before signing.<sup>108</sup> The caseworker should explain each term and condition of the plan to the parents.<sup>109</sup> The Family Code also contains mandatory language requiring the parent to sign the plan.<sup>110</sup> It is important to note that the plan takes effect when it is signed by the parents and DFPS.<sup>111</sup>

If your client does not agree to the service plan, and/or you intend to seek modifications of the plan, did you advise your client not to sign the plan beforehand? While the court reviews the plan and has authority to amend it, the plan is effective from the time that both sides sign or when DFPS signs it and files it.<sup>112</sup> Therefore, even if the parents refuse to sign the plan, the plan becomes effective when it is filed.

The review of the plan takes place at the status hearing. Raise any concerns you have about the plan. Do the recommended services address the concerns that led to the Department's involvement with the family? Or, do

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<sup>105</sup> *Id.* § 263.102(b).

<sup>106</sup> *Id.* § 161.001(o).

<sup>107</sup> *Id.* §§ 262.2015, 263.201(b), cmt.

<sup>108</sup> *Id.* § 263.103(a).

<sup>109</sup> *Id.* § 263.103.

<sup>110</sup> *Id.* § 263.103(b).

<sup>111</sup> *Id.* § 263.103(d).

<sup>112</sup> *Id.* §263.103(d).

you believe you should ask the Department to modify the plan of service? Should you request that the court delete from the plan services that you do not believe relate to the issues, or are redundant of other services?

Review the service plan with the client and make sure they understand what it is, and what the plan will obligate the parent to do:

- Make sure client understands importance of the Service Plan. Sometimes the attorney's attitude about the Service Plan makes an impact on the parent.
- Ensure client understands they must engage in services immediately and do what you can to ensure CPS gets services set up ASAP.
- Convey the importance of gathering and keeping track of documentation.
- Work with your client to create a calendar of upcoming appointments and other significant events.

Discuss with your client practical considerations for successful participation in services, such as:

*The client's work schedule:* Many parents justifiably fear they will lose their jobs if they are forced to take time off from work to participate in services. One way to lessen the impact of participation in services on the client's employment is to schedule as many services as possible during non-work hours, or on days off. Do you know your client's work schedule? Does your client have set days off? Have you provided this information to the caseworker? Have you asked the caseworker which services are available on evenings or weekends? Your client may need to contact service providers directly to acquire this information.

*What means of transportation are available to your client?* Many parents in CPS cases do not own reliable transportation, and must rely on the bus system or rides from others to travel to their appointments or parent-child visits. Does your client need assistance with transportation? Are there service providers geographically closer to the client's home or work location? Are in-home service providers available? Are services scheduled to allow sufficient travel time between appointments so your client can timely attend each required appointment? Are bus passes available?

*Drug treatment:* Many CPS cases involve parents who have substance abuse issues. In these cases, the Department will request a drug and alcohol assessment to determine what treatment is appropriate for the parent: inpatient, outpatient, drug testing, etc. If inpatient treatment is recommended, it can require thirty to ninety days in a residential treatment program. This often delays the client's ability to participate in other services. It may also jeopardize the client's employment if he/she is currently employed. That in turn can affect the client's ability to maintain housing. If inpatient treatment will cost the client his/her job, and in turn, housing, have you identified a suitable alternative that may be appropriate, such as intensive outpatient treatment and/or frequent drug testing?

*Family Drug Court Program:* In 2005, the 79th Legislature added §§264.801–805 to the Texas Family Code, providing for the use of “Family Drug Court Programs” in CPS cases involving parents with substance abuse issues.<sup>113</sup> The commissioner's court of a county may establish a family drug court program.<sup>114</sup> The costs of participation are based on ability to pay.<sup>115</sup> Funding for this program may come from the court improvement project funds or federal and state matching funds.<sup>116</sup> Parents willing to volunteer for the program will receive comprehensive case management services and their case will be monitored by a drug court judge or master.

**» NOTE : Drug-court programs are more service intensive, so familiarize yourself with the drug court's requirements beforehand.**

<sup>113</sup> *Id.* §§ 264.801 et seq.

<sup>114</sup> *Id.* § 264.802.

<sup>115</sup> *Id.* § 264.804.

<sup>116</sup> *Id.* § 264.805.

*Child support:* Your client may be asked to pay child support. Does your client already pay child support? How much and for who? Is your client on disability? Have you determined your client's monthly income and expenses? Do you know whether, or what amount, your client can afford to pay, so that you have a counter-proposal to any amount CPS or the AAL request?

After reviewing the plan the court may also enter orders to facilitate the performance of the plan or order compliance with it.<sup>117</sup> Failure to comply with a court order may be punishable through the contempt power of the court.

## Other Matters

*Relative Placement:* Have any additional relatives surfaced as possible placement options? If the court did not authorize the child's placement with a relative or symbolic relative at the Adversary Hearing, is it appropriate to revisit the issue? Was a home study needed before the court would authorize the requested placement?<sup>118</sup> If yes, are the home study results now available? Did the home study recommend placement with the proposed relative or symbolic relative? If not, why not? Can the concerns that led to an unfavorable home study be remedied? Are you prepared to suggest how the concerns can be remedied? If the concerns cannot be remedied, do you have someone else to offer as a placement option for the child? Will they attend the status hearing?

## After the conclusion of the Status Hearing

Obtain a copy of the status hearing order and make sure your client has a copy. Review with your client the status hearing orders and the date, time and location of the next hearing typically, but not always, the initial permanency hearing.<sup>119</sup>

**» NOTE :** Does your client understand the critical importance of immediately engaging in services and consistently and timely participating in services? The client will be discharged or dropped from a class or program for missing scheduled classes, or appearing late for services. If this happens, the parent must restart the class or program from the beginning. Many times classes only start once every 8–12 weeks. Being discharged for failure to attend can set a parent back so that insufficient time remains in the case for them to successfully complete services and achieve reunification with their child. Review any rules of engagement with client, for example, how many parenting classes can your client miss before they are unsuccessfully discharged from the class, and required to start over.

Has the client's housing or employment changed since the last hearing? If yes, do you have the new contact and employment information?

## The Initial Permanency Hearing

Review hearings held during the time that CPS has placed the child in temporary foster care are called "permanency" hearings.<sup>120</sup>

Not later than 180 days after the date the court renders a temporary order appointing the department as temporary managing conservator of a child, the court must hold a permanency hearing to review the status of,

<sup>117</sup> *Id.* § 263.106.

<sup>118</sup> *Id.* §§ 262.114, 264.753.

<sup>119</sup> *Id.* § 263.304.

<sup>120</sup> *Id.* § 263.301, intro. cmt.

and permanency plan for, the child to ensure that a final order consistent with that permanency plan is rendered before the date for dismissal of the suit under this chapter.<sup>121</sup>

### Preparation for the Initial Permanency Hearing

At the initial permanency hearing, the court typically inquires about, and the parties typically testify regarding, the following categories of information:

*Your client's progress with his/her service plan:* How is your client progressing with services? Which services have they initiated? Which have they completed? Is he/she having problems participating in services? Is the problem with the client? Or has CPS delayed or failed to set up the services? Has the service provider cancelled appointments or been late or unavailable for scheduled appointments? It's important to know why there's a problem, because if the fault is with your client, that's not going to help his/her case. Indeed, it may provide the Department a new basis to seek termination of parental rights.<sup>122</sup> Have you or the client documented the client's efforts to participate in services and the reasons why he/she has been unsuccessful?

*Proof of your client's participation in services:* Has your client provided you and the caseworker with copies of certificates showing successful completion of court-ordered services for those services that issue such certificates? Has your client obtained copies of sign-in sheets for attendance at court-ordered alcoholics anonymous (AA), narcotics anonymous (NA), or cocaine anonymous (CA) meetings? Have you obtained service-provider letters evidencing the client's progress in a particular class or program, such as a letter from a therapist regarding participation in counseling? Have copies of these documents been provided to the caseworker? Who is bringing these documents to the permanency hearing?

**» NOTE :** The Department is the petitioner in the case. It is not obligated to assist your client in marshaling or presenting evidence favorable to her case. For example, if the home conditions are an issue in the case, and the Department presents photographs depicting deplorable living conditions, it is not enough to argue that you requested that the Department revisit and take photos after the parent cleaned the home, but the worker never did so. If you truly wish to rebut the photographic evidence, your client should be presenting her own photographs as rebuttal evidence.

*Service Providers:* Just because your client is attending services doesn't mean he/she is making progress. The service provider can tell you whether your client actively participates, grasps the materials or concepts, or demonstrates the ability to apply the lessons. Conversely, the provider can tell you if your client is not actively participating, or actively participates but demonstrates little or no understanding of the materials (doesn't get it). If that's happening, does the provider have an opinion why your client is not succeeding?

*The Caseworker, CASA and AAL:* Does the caseworker report that your client is engaging in services? If not, which services has the client failed to initiate, participate in, or complete? Has the client had a positive (dirty) drug screen? For what drug(s)? Has the client been regularly and timely attending visits with the children? Is the client appropriate during visits? Any concerns? What are they? Is the client maintaining court-ordered, or sufficient, contact with the caseworker?

Does the attorney ad litem, guardian ad litem or CASA have specific concerns about your client's participation in services? What are they? Are the concerns based on personal knowledge? If not, on what source is the caseworker or CASA relying? When and under what circumstances did each last have contact with your client?

<sup>121</sup> *Id.* § 263.304.

<sup>122</sup> *See id.* § 161.001(O) (failure to comply with a court order that specifically establishes actions necessary for parent to obtain return of child may form basis for termination of parental rights).



***Permanency Conferences:*** The service plans are usually reviewed at meetings called Permanency Conferences (PC). These are meetings that the Department is required to conduct, and for which all parties are provided notice and the opportunity to attend. Attorneys who attend PCs often gain valuable information about their client's compliance with the service plan, and possible changes in the long-term plan for the children.<sup>123</sup>

***Family Group Conferences (FGC):*** FGCs can be used in lieu of permanency conferences depending on the level of family involvement. Family Group Conferencing is similar in function to a PC. Parents are encouraged to invite individuals they want present such as family and friends, for support, input, and feedback.

The Department closely monitors the parent's compliance with services, and if the parent does not make adequate progress by a certain point in the case, the Department will change its permanency plan from re-unification to adoption (termination of the parent-child relationship), permanent relative placement, or permanent managing conservatorship to the Department. This change is usually first announced at the PC or FGC.

***Notice of Initial Permanency Hearing:*** You are entitled to 10 days' notice of the initial permanency hearing.<sup>124</sup> In some jurisdictions, the parties get the original notice in open court at the status hearing.

***Permanency Planning:*** The Department must prepare a permanency plan for the child for whom the department has been appointed temporary managing conservator, and must provide a copy of the permanency plan report to the parent, among others, no later than the 10th day before the date of the initial permanency hearing.<sup>125</sup>

***The Permanency Plan Court Report:*** Specific information must be included in the permanency plan report, including whether the Department recommends that the suit be dismissed or continued.<sup>126</sup> The permanency plan report will also include an evaluation of the parties' compliance with the temporary orders and with the service plan.<sup>127</sup> And the permanency plan report will include the permanency plan for the child.<sup>128</sup>

***What Does the Permanency Hearing Court Report Say and What Are the Recommendations in the Report?*** Did the parent(s) review the report? Does the client dispute the accuracy of the report in any respect? If yes, in what respect is the information inaccurate? Does the client object to recommendations in the report? How should the recommendations be modified?

***Parents' Response to Department's Court Report:*** The parent has the right to submit a written response to the permanency plan report.<sup>129</sup> The response must be filed not later than the third day before the date of the hearing.<sup>130</sup> This is a potentially valuable and surprisingly underutilized tool for parents, perhaps because the Department's permanency reports frequently are not timely prepared. If the failure to timely provide the report prejudices your ability to adequately prepare for the permanency hearing, consider requesting a continuance.

## **What the court will do at the Initial Permanency Hearing**

***Findings at the Initial Permanency Hearing:*** The Court is statutorily required to take specific actions at the initial permanency hearing.<sup>131</sup> Among them is to return the child to the parent if the parent can demonstrate the willingness and ability to provide the child with a safe environment; and the return of the child is in the child's best interest.<sup>132</sup>

At the permanency hearing, if you plan to argue for the return of the child to your client, you must present evidence that addresses the factors outlined in section 263.307, and demonstrate that your client can provide the child with a safe environment.

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<sup>123</sup> See *id.* § 263.104 (amended service plan).

<sup>124</sup> *Id.* § 263.301.

<sup>125</sup> *Id.* § 263.3025.

<sup>126</sup> *Id.* § 263.303.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* § 263.303.

<sup>130</sup> *Id.*

<sup>131</sup> See *id.* § 263.306.

<sup>132</sup> *Id.*

*Child's Placement Reviewed:* If the Court does not find that returning the child to the parent(s) is in the child's best interest, the Court may place the child with a person willing and able to provide the child with a safe environment if that is in the child's best interest.<sup>133</sup> This could be a relative, symbolic relative, foster home, or if the child requires a more structured environment, a residential treatment center. The Court will evaluate the Department's efforts to identify relatives who could provide the child with a safe environment, if the child is not returned to a parent or another person entitled to service under chapter 102.<sup>134</sup>

*The Court Will Review the Parent's Compliance With the Service Plan:* The Court will again review the parents' compliance with temporary orders and the service plan, to determine to what extent progress has been made in alleviating or mitigating the causes necessitating the placement of the child in foster care.<sup>135</sup>

*Discussion With Client Prior to Hearing:* The attorney should candidly discuss the reality of the child being returned at the First Permanency Hearing. Because it is only six months from the beginning of the case, with little time to complete many services, it is very unlikely that a child will be returned this early in the case.

### Advocacy at the Initial Permanency Hearing

Depending on your client's progress with services, you may be able to argue for a dismissal, extension, monitored return of the child, expanded visitation, unsupervised visitation, or other favorable relief.<sup>136</sup>

At the hearing, are you prepared to present to the Court the information and documentation showing your client's compliance with his/her service plan and court-ordered services? Can you explain your client's reason(s) for any alleged non-compliance with services?

If you believe your client requires special accommodations in order to successfully participate in services, have you requested them? For example, the psychological evaluation may indicate your client is a concrete thinker and learns best through modeling rather than by having concepts presented in a classroom setting. Your client may benefit from "homemaker services", in which a trained person comes to the home to show the client how to do specific tasks, as opposed to being presented curriculum in a classroom setting. Likewise, "shadow parenting" by a provider may be more effective than a parenting class.

*Case Assessment:* Typically, CPS cases progress on a dual track, called "concurrent planning." This usually consists of a permanency plan of reunification and either: (1) termination/adoption, (2) permanent relative placement, or (3) permanent managing conservatorship to the Department without termination. The Texas Family Code now requires DFPS to have a concurrent plan for each child in its temporary managing conservatorship.<sup>137</sup> How does your client's participation with services stack up against the concurrent plans for permanency? Which outcome is looking more likely?

**» NOTE : Trial Preparation : Regardless of how your client is progressing with services, the prudent attorney will engage in trial preparation at each stage of the case.**

*Trial Setting:* If the court has not already done so, the Court may set a final hearing (trial setting) on a date that allows the Court to render a final order before the date for dismissal of the suit. The parties have an enforceable right to compel the Court to comply with its duty to set the date for final hearing.<sup>138</sup>

*The Jury Demand:* Under a standard pre-trial scheduling order, the date of the initial permanency hearing, or another date, may be designated as the deadline by which to make a jury demand. If not, TRCP 216(a) controls the

<sup>133</sup> *Id.* § 263.306.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 263.306(b)(1)(D).

<sup>136</sup> *See id.* §§ 263.306(4), 263.401(b), 263.403.

<sup>137</sup> Tex. Fam. Code §263.3025(d).

<sup>138</sup> Tex. Fam. Code § 263.304(b).

deadline to make the jury demand.<sup>139</sup> Also see a recent 3<sup>rd</sup> Court of Appeals case where a mother failed to make a timely jury demand under the provisions of TRCP 216(a).<sup>140</sup>

### Subsequent Permanency Hearings

A subsequent permanency hearing before entry of a final order shall be held not later than the 120th day after the date of the preceding permanency hearing in the suit.<sup>141</sup> The procedures for subsequent permanency hearings are the same as those set out for the initial permanency hearing.<sup>142</sup> The Court can set more frequent permanency hearings.<sup>143</sup>

*Family Group Reconferencing.* FGCs may be used at the end of a case to voluntarily return a child to family when it can be demonstrated that the family's resources will be marshaled to care for the child, such as providing child care while the parent is at work, or help for a disabled parent to care for a child.

If it has not become apparent sooner, by the second permanency hearing, you should know whether the Department will seek termination or permanent managing conservatorship of the child. Has the Department announced that the permanency plan for the child has been changed from reunification?

**» NOTE :** Always ask what the permanency plan is for the child. Do not simply rely on the stated plan as indicia of where the case is headed. What are the service providers reporting? Has progress been excellent, unimpressive, marginal, and/or non-existent? Has the client obtained stable housing and maintained stable legal employment? Is the client clean and sober? How extensive is the client's history? Is there a long standing history of drug use, prior termination of parental rights, persistent CPS referrals, and/or criminal activity? What kind of picture do you see developing? Do the developing facts support the return of the child to the parent?

The court must consider return to the parent at each subsequent permanency hearing, if the parent is willing and able to provide the child with a safe environment AND return is in the best interest.<sup>144</sup>

At this point the parent may be closer to demonstrating that their child should be returned. As the parent's attorney, frequent contact with the caseworker about setting up services and progress is essential. Ensure you understand how your client can demonstrate progress. Communicating in writing is best. As your parent client makes progress, consider asking for less restrictive conditions such as fewer U/As or more frequent or unsupervised visits with their child / children.

Explore the possibility of a return and dismissal or a monitored return before the second permanency hearing held pursuant to Section 263.306. Discuss the possibility of a transition plan to re-introduce the child into the parent's life/home.

### Court Ordered Mediation

At some point, your case may be ordered to mediation, or you may elect to request mediation. Mediation can be an opportunity to achieve an agreement on all or some of the issues in the case. The mediation may be a way to reach an agreement for some form of reunification, shared conservatorship, a relative placement agreement, or a permanency order that allows your client continuing custodial or contact rights without relinquishing her

<sup>139</sup> Tex. R. Civ. P. 216(a).

<sup>140</sup> *Gammill v. Texas Department of Family and Protective Services*, No. 03-08-00140-CV, Austin, May 22, 2009.

<sup>141</sup> *Id.* § 263.305.

<sup>142</sup> *Id.* § 263.306.

<sup>143</sup> *Id.* § 263.305.

<sup>144</sup> Tex. Fam. Code Ann §§ 263.306, 263.307.

parental rights. You should be prepared with information and creative ideas before you walk into the mediation. Additionally, it is important to learn whether the AAL supports relinquishment or is open to other outcomes. Likewise, determine the CASA's position.

## » NOTE :

### **Benefits of Mediation — for the Parent**

- 1) Empowerment of your client.
- 2) Helps preserve familial relationships.
- 3) Quicker resolution/permanency.
- 4) Less traumatic than trial.

### **Should your client participate in Mediation?**

- 1) Yes, but prepare your client.
- 2) The Department may want a relinquishment of parental rights.
- 3) Explain what a relinquishment is ahead of time.
- 4) Affidavits of Relinquishment to CPS are IRREVOCABLE.
- 5) The affidavit will be presented to the court and used to terminate the parent's rights.
- 6) Any promises made to place a child with a relative that CPS does not follow through with or even act on, cannot be a basis to revoke the Relinquishment.
- 7) Explain that relinquishment or termination of all parental rights (including any father's rights that may exist) is required for a child to be adopted by another adult.
- 8) Explain that once rights are relinquished or terminated, the Department will become the sole managing conservator of the child, with all rights and duties afforded and imposed by the Texas Family Code.
- 9) Consider whether Mediation is appropriate if your client is mentally retarded or mentally incompetent (such that a guardian is needed).

### **Relatives**

- 1) Ensure your client has disclosed all viable relatives.
- 2) Ensure you have done everything you can to involve the Department in assessing the relative for placement or something more legally permanent.
- 3) Contact any family that can be supportive to your client at Mediation (if allowed in your jurisdiction).

### **Preparing for Mediation**

- 1) Make a formal request for the case record in plenty of time to prepare for Mediation, which may become more evident after the initial permanency hearing.
- 2) Review every piece of paper in the record.
- 3) Look at the active pleadings.

- 4) Understand what the Department can and cannot prove and remember the standard for termination is “clear and convincing” evidence on both termination grounds and best interest.
- 5) Pay close attention to case narratives and caseworker logs, which may indicate their perception or the tenor of any testimony at a trial.
- 6) Therapy notes may demonstrate the progress, or lack of, and will generally indicate the tenor of testimony by the therapist.
- 7) Review psychological and other evaluations.
- 8) Review visitation notes.
- 9) Contact the AAL and GAL (if appointed for child).
- 10) If available in your jurisdiction, review offense reports related to the facts which led to the child(ren) entering foster care or which may be used to show your client is unable to adequately parent his or her child(ren).

#### Possible Legal Outcomes

- 1) Relinquishment of parental rights, child in sole managing conservatorship of the Department.
- 2) Parent may enter into a PMC/PC relationship with another adult or Department, rights of the parent are not severed.
- 3) PMC/PC and JMC agreements not favored because it prevents adoption and relegates a child to long-term foster care.

*Relinquishment:* The Department often seeks a parent's voluntary relinquishment of parental rights at mediation. You should familiarize yourself with the Affidavit of Relinquishment, and review this document with your client before the mediation. You must be able to advise your client on the legal consequences of relinquishment versus, say, termination based on an endangerment ground.<sup>145</sup>

**» NOTE :** The legislature modified the content requirements for an affidavit of relinquishment, effective September 1, 2007.<sup>146</sup> Make sure the affidavit complies with current statutory requirements.

**» NOTE :** Some practitioners have their clients sign a very detailed “disclosure” form reciting that the attorney reviewed the affidavit of relinquishment with the client and advised the client of legal significance and consequences of executing an affidavit of voluntary relinquishment of parental rights. This practice followed on the heels of two cases.<sup>147</sup>

<sup>145</sup> See Tex. Fam. Code § 161.001(1)(D), (E), (M).

<sup>146</sup> H.B. 3997, § 5, 80th Leg., eff. September 1, 2007.

<sup>147</sup> See *Lumbis v. Texas Dep't of Protective. & Regulatory Servs.*, 65 S.W.3d 844 (Tex. App. – Austin, pet. denied) (mother who relinquished asserted her court-appointed attorney misrepresented to her the full consequences of relinquishing her rights); see also *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. – Austin 2000, pet. denied, 53 S.W.3d 684 (Tex. 2001) (child placing agency failed to fully advise relinquishing teen-mother that “continuing contact” agreement with adoptive parents is legally non binding).

*The Medical History Report Form:* A parent who signs an affidavit of voluntary relinquishment of parental rights under Section 161.103 must also prepare a medical history report that addresses the medical history of the parent and the parent's ancestors.<sup>148</sup> CPS has adopted a form for use to comply with this section.<sup>149</sup> The form is available on the CPS website: [http://handbooks.tdprs.state.tx.us/site\\_map/forms.asp](http://handbooks.tdprs.state.tx.us/site_map/forms.asp) (Form # 2934).

**» NOTE :** Is your client considering relinquishing parental rights as part of a Rule 11 agreement? If so, it may be possible to obtain for your client: (1) a goodbye visit and photographs of the child(ren), or (2) an agreement that requires the Department to use best efforts to place the child with a relative of your client's choosing; or (3) an agreement that allows your client some kind of continuing contact with the child while the child remains in the Department's conservatorship.

You should have a realistic take on the facts in the case, so that you can advise your client what he/she gains by settling the case as opposed to proceeding to trial. Even if there are very good legal reasons for a client to relinquish, a parent may elect to go to trial rather than relinquish. If so, and if no other agreement can be reached, you may still have options short of trial.

### Effect of a Protective Order

A parent's attorney should understand the effect a Protective Order can have on their client's ability to reunify with their child as the managing conservator. Pursuant to Section 153.004:

- (a) in considering whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.
- (b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.
- (c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.
- (d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:

<sup>148</sup> Tex. Fam. Code § 161.1031.

<sup>149</sup> See *id.* 161.1031(b).



- (1) finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child; and
- (2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:
  - (A) the periods of access be continuously supervised by an entity or person chosen by the court;
  - (B) the exchange of possession of the child occur in a protective setting;
  - (C) the parent abstain from the consumption of alcohol or a controlled substance, as defined by Chapter 481, Health and Safety Code, within 12 hours prior to or during the period of access to the child; or
  - (D) the parent attend and complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, or, if such a program is not available, complete a course of treatment under Section 153.010.
- (e) It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.
- (f) In determining under this section whether there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, a spouse, or a child, the court shall consider whether a protective order was rendered under Chapter 85, Title 4, against the parent during the two-year period preceding the filing of the suit or during the pendency of the suit.<sup>150</sup>

### The One-Year Deadline for Finality in CPS Cases

If the trial court has not commenced the trial on the merits or granted an extension, on the first Monday after the first anniversary of the date the Court rendered a temporary order appointing the Department as temporary managing conservator, the Court must dismiss the suit filed by the Department, that requests termination of the parent-child relationship or requests that the Department be named conservator of the child.<sup>151</sup>

**» NOTE :** Under this new scheme, the requirement to render a final order before the deadline date is eliminated. Consequently, 263.401(d) is repealed effective June 15, 2007 and will no longer set out a definition for a "final order", nor apply for cases filed after June 15, 2007.

*The statutory dismissal date is not jurisdictional:*<sup>152</sup> A party to the suit who fails to make a timely motion to dismiss the suit, waives the right to object to the Court's failure to dismiss the suit. A motion to dismiss is timely if the motion is made before the trial on the merits commences.<sup>153</sup>

<sup>150</sup> Tex. Fam. Code § 153.004.

<sup>151</sup> Tex. Fam. Code § 263.401(a) [effective for SAPCRs filed on or after June 15, 2007, only].

<sup>152</sup> *In re Department of Family & Protective Services*, 273 S.W.3d 637 (Tex. 2009)(orig. proceeding)

<sup>153</sup> *Id.* § 263.402(b) [effective for SAPCRs filed on or after June 15, 2007, only].

» **NOTE :** If the trial court denies the motion to dismiss, the dilemma for the parent's attorney is whether to file an appeal, an original mandamus proceeding, or both. The Texas Supreme Court has held that an appeal is an adequate remedy in certain circumstances.<sup>154</sup> One dissent argued that existing mandamus jurisprudence in termination cases should apply.<sup>155</sup> You are encouraged to read the majority and dissenting opinions.

### One-Time Extension of the Dismissal Deadline

In lieu of the original dismissal deadline, you may be able to obtain additional time for your client to seek reunification. Has the client made sufficient progress to justify an extension of the case or a monitored return?<sup>156</sup>

*Extension of Dismissal Deadline:* Unless the court has commenced the trial on the merits, the court may not retain the suit on its docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the best interest of the child. If the court makes those findings, it may retain the suit on its docket for a period not to exceed 180 days after the time described by Subsection (a).<sup>157</sup>

If the Court extends the one-year deadline, it must render an order that: (1) schedules a new date on which the suit will be dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a); (2) makes further temporary orders for the safety and welfare of the child as necessary; and (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).<sup>158</sup>

If the court grants an extension but does not commence the trial on the merits before the date for dismissal under Subsection (b), the Court shall dismiss the suit.<sup>159</sup> The court may not grant additional extensions that extend the suit beyond the required date for dismissal under Subsection (b).<sup>160</sup> Nor may the parties extend the deadlines by agreement or otherwise.<sup>161</sup>

*Motion to Dismiss:* As with the original deadline, under the extended deadline, if a party fails to make a timely motion to dismiss the suit, she waives the right to object to the court's failure to dismiss the suit. A motion to dismiss under this subsection is timely if made before the trial on the merits commences.<sup>162</sup>

### Monitored Return of Child

The court may retain jurisdiction and not dismiss the suit or render a final order as required by §263.401 if the court renders a temporary order that: (1) finds that retaining jurisdiction is in the best interest of the child; (2) orders the Department to return the child to the child's parent; (3) orders the Department to continue as the child's temporary managing conservator; and (4) orders the Department to monitor the child's placement to ensure that the child is in a safe environment.<sup>163</sup> The order must contain specific findings regarding the grounds for the order and schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced.<sup>164</sup>

<sup>154</sup> See *In re Texas Dep't of Family & Protective Servs.*, 210 S.W.3d 609 (Tex. 2006)(majority opinion).

<sup>155</sup> *Id.* at p.9, (Justice Harriet O'Neill, dissenting).

<sup>156</sup> Tex. Fam. Code § 263.401(b), 263.403(a).

<sup>157</sup> *Id.* § 263.401(b). [effective for SAPCRs filed on or after June 15, 2007, only].

<sup>158</sup> *Id.* [Effective for cases filed on or after June 15, 2007, only].

<sup>159</sup> *Id.* § 263.401(c). [Effective for cases filed on or after June 15, 2007, only].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* § 263.402(a).

<sup>162</sup> *Id.* § 263.402(b). [Effective for cases filed on or after June 15, 2007, only].

<sup>163</sup> *Id.* § 263.403(a).

<sup>164</sup> *Id.* § 263.403(b). [Effective for cases filed on or after June 15, 2007, only].

## Removal of Child from Monitored Return

If a child placed with a parent under §263.403 must be removed from the home by the Department before the dismissal of the suit or the commencement of the trial on the merits, the Court shall, at the time of the move, schedule a new date for dismissal of the suit unless a trial on the merits has commenced. The new dismissal date may not be later than the original dismissal date established under §263.401 or the 180th day after the date the child is moved under §263.403, whichever is later.<sup>165</sup>

If the placement back in the home extends beyond the 180 days, both state and federal law require a new Chapter 262 removal order. If the child is removed from the home after 180 days of monitoring, in the absence of a new removal order, the suit is subject to dismissal.<sup>166</sup>

## Preparing for Trial

If the Department proceeds to trial, it has the burden to show that parental rights should be terminated or that the Department should be appointed the permanent managing conservator of the child.

***Burden of Proof:*** In a termination suit, the Department has the burden to present “clear and convincing evidence” of at least one ground for termination; and, that termination of the parent-child relationship is in the best interest of the child.<sup>167</sup> “Clear and convincing evidence” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.<sup>168</sup>

» **NOTE : Texas Family Code § 161.001 was amended to add new grounds for termination of parental rights based on the offense of attempted murder or solicitation of murder of the child's other parent.**<sup>169</sup>

***Best Interest:*** The non-exclusive factors used to determine whether termination of the parent-child relationship is in the best interest of the child are:

(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.<sup>170</sup>

<sup>165</sup> *Id.* § 263.403. [Effective for cases filed on or after June 15, 2007, only].

<sup>166</sup> *Id.* § 263.403, cmt.

<sup>167</sup> *See id.* §§ 161.001, 161.002, 161.003, 161.004, 161.103, 161.106, 161.204.

<sup>168</sup> *Id.* § 101.007.

<sup>169</sup> *See* Tex. Fam. Code §§ 161.001(T)(ii), (iii), amended by SB. 1838, 81st Leg., R.S. (2009) [Effective September 1, 2009].

<sup>170</sup> *Holly v. Adams*, 544 S.W.2d 367, 271-72 (Tex. 1976).

» **NOTE :** You will note that the factors used to determine whether termination of parental rights is in the best interest of the child are different from the factors used in a permanency hearing to determine whether the return of the child to the parent is in the child's best interest.<sup>171</sup> Generally, the fact-finder applies the non-exclusive Holly factors when making the finding that termination of the parent-child relationship is in the child's best interest.<sup>172</sup> However, the Texas Supreme court has stated "[T]here are several factors that should be taken into account when determining whether termination of parental rights is in the best interest of the child, including the stability of a proposed placement and the willingness of a child's family to effect positive changes."<sup>173</sup>

» **NOTE :** Sampson & Tindall's Texas Family Code (August 2008) includes an article that identifies "leading" cases interpreting each termination ground and the "best interest" requirement in termination cases. "Grounds For Termination of Parental Rights" by Woodruff, Hooten & Childress (September 2007) Texas Family Code (August 2008). This is a good starting point to acquaint yourself with case-law interpreting the statutory grounds for termination & the "best interest" requirement. Practitioners using this article should carefully review the case law, including memorandum opinions, in their respective jurisdictions for variations from the representative cases. See Chapter 5 for an excerpt from this article.

*Discovery:* Although discovery is discussed here as part of trial preparation, in reality, many practitioners propound and review discovery throughout the pendency of the case.

*CPS Case File:* As part of the fruit of your discovery, you will obtain a de-identified<sup>174</sup> copy of the CPS case file, and the Department's response to your requests for disclosure, in which they identify their witnesses. The de-identified file is laden with useful information, including caseworker logs, the identity of possible lay or expert witnesses, and other documents, or references to documents, associated with a particular witness.

Police incident reports or certified copies of convictions related to the parties in the case may not be included in the Department's de-identified file. That is also true of some videos (police interviews and CAC videos). Those may only be available through additional formal discovery propounded on non-parties.

Likewise business records relating to the case may not be included in the de-identified file, such as records from therapists, psychologists, psychiatrists, hospitals, victims-of-domestic-violence shelters, drug treatment programs, schools, and others who have worked with the parent or family. Typically, the Department introduces these as 902(10) business records.<sup>175</sup> If you want these earlier in the case, you will have to propound discovery on the appropriate entity.

*Pleadings:* Are your pleadings in order? Do you need to file any additional or amended pleadings in the case?

<sup>171</sup> Compare *Holly v. Adams*, 544 S.W.2d at 371-72, with Tex. Fam. Code § 263.307(b).

<sup>172</sup> See 2008 Texas Pattern Jury Charges, Family, PJC 218.1.

<sup>173</sup> Citing, Tex. Fam. Code § 263.307; *Holley v. Adams*, 544 S.W.2d 367, 372, 20 Tex. Sup. Ct. J. 76 (Tex. 1976); *In re R.R. & S.J.S., Children*, 209 S.W.3d 112, 116, (Tex. 2006).

<sup>174</sup> A "de-identified" copy means that the identity of persons reporting abuse or neglect has been redacted from the file, as well as the identity or location of foster parents. See Tex. Fam. Code § 261.201 & *Comment*.

<sup>175</sup> TRE 902(10).

**Jury Charge:** For guidance in the preparation of the jury charge, see 2008 Texas Pattern Jury Charges, Family, published by the Texas State Bar.<sup>176</sup> You should also review the following cases regarding broad form submission in CPS termination cases: *Texas Department of Human Services v. E.B.*, *Crown Life Insurance Co. V. Casteel*, and *In the Interest of B.L.D. and B.R.D.*<sup>177</sup>

**Prepare a motion in limine:** In some counties, there may be a standing limine order as part of the local rules. Another possible source is to obtain a copy of a motion in limine that the Department uses in its jury trials. These are merely suggested starting points. You will have to modify the motion to suit the specifics in your case. Or you may wish to develop yours entirely on your own.

» **NOTE : The trial court appreciates cites to authority supporting each request to limine a particular matter.**

**Prepare an exhibit list:** If possible, pre-mark your exhibits. Attach copies of the exhibits to the list. Review the predicates for admission into evidence of any exhibits you intend to offer. Anticipate, and be prepared to respond to, objections to the admission of your exhibit(s).

**Voir Dire:** Allow sufficient time for your preparation of the voir dire. This is one of the most challenging parts of a jury trial, and also one of the most important. If you have never conducted a voir dire examination, observe voir dire in a few CPS jury trials.<sup>178</sup> Practitioners have found it helpful to have a second person at voir dire who can make notes of panel member responses, for use when requesting strikes for cause, or when deciding peremptory strikes.

**Pre-trials:** Different judges use uniform pre-trial procedures. If the pre-trial order does not answer questions you have about trial related matters, ask the judge about the procedures she utilizes. What is the deadline for preparation and exchange of an exhibit list? Are you expected to append copies of the exhibits to the exhibit list? What is the deadline to prepare and exchange the motion in limine, and any proposed charge? Are you expected to confer with opposing counsel and identify exhibits that will be admitted without objection? Are you expected to confer with opposing counsel to identify those items in each motion in limine that are agreed. How and when does the court want proposed charges submitted? Many of these questions may be spelled out in a pre-trial order, or may be addressed in a pre-trial hearing.

**Witnesses:** Have you familiarized witnesses with court decorum, appropriate dress, what to do when an objection is raised, etc.? Have you conducted witness interviews and prepared questions for each witness to be used at trial? Have you subpoenaed your witness? Do not forget the witness fee.

**Texas Rules of Evidence:** In preparation for trial, review the Texas Rules of Evidence. Routine evidence issues often include: predicates for admission of expert testimony and opinions, hearsay and its exceptions,<sup>179</sup> and predicates for the admission of non-testimonial evidence (documents, business records, physical evidence, etc).

**What if your client does not show up for the jury trial: Waiver/Withdrawal of Jury Demand:** Texas Rule of Civil Procedure 220 provides that a party's failure to appear for trial shall be deemed a waiver by him of the right to trial by jury.<sup>180</sup> However, if the attorney for the party appears, this is treated as if the party has appeared, and the right to the jury trial is not waived.<sup>181</sup>

<sup>176</sup> 2006 Texas Pattern Jury Charges, Family.

<sup>177</sup> Compare *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990 (op. on reh'g) (approving single broad-form question incorporating two statutory grounds for termination of parental rights submitted disjunctively) with, *Crown Life Insurance Co. V. Casteel*, 22 S.W.3d 378, 387-90 (Tex. 2000) (when single broad form submission question erroneously co-mingles valid and invalid theories and objection is timely and specific, error is harmful and new trial is required); see also, *In the Interest of B.L.D. and B.R.D., Minor Children*, 113 S.W.3d, 340 (Tex. 2003)(complaints of error in broad-form submission of jury questions must be preserved by objection at trial; utilize broad form submission when feasible).

<sup>178</sup> See also *In the Interest of C.S., A.K.A., C.R. and C.S., Children*, 2007 Tex. App. LEXIS 5481 (Ft. Worth Ct. App. July 12, 2007).

<sup>179</sup> Regarding prerecorded statements or videotaped or televised broadcast of child testimony, refer to Tex. Fam. Code §§ 104.001 et seq.; See also *ITIO S.B. and Y.B., Children*, 207 S.W.3d 877, 883 (Tex. App. – Fort Worth 2006, no pet.)(circumstances under which court must make determination that use of child's statement in lieu of testimony necessary to protect child's welfare); *In the Interest of S.P.*, 168 S.W.3d 197 (Tex. App. – Dallas 2005, no pet.)(judgment reversed based on failure to find that use of child's statement in lieu of testimony necessary to protect child's welfare); *In the Interest of P.E.W., II, K.M.W. and D.L.W.*, 105 S.W.3d 771, 775 (Tex. App. – Amarillo 2003, no pet.)(indicia for reliability of child hearsay statements); *In the Interest of R.V., Jr. and C.V.*, 977 S.W.2d 777, 780-81 (Tex. App. – Ft. Worth 1998) (children's testimony by remote televised broadcast was permissible under §104.004; Tex. R. Evid. 803(3), (4). For a helpful overview of the sixth amendment right to confrontation in criminal cases read *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>180</sup> Tex. R. Civ. P. 220.

<sup>181</sup> *In re W.B.W.*, 2 S.W.3d 421, 422-23 (Tex. App. – San Antonio 1999, no pet.).

It is not unusual for a parent to fail to appear for the jury trial. Did you obtain authorization from your client to withdraw or waive the jury demand in the event the client does not appear? This is a possible circumstance you should anticipate and discuss with your client the first time you meet. It may be prudent to obtain from the client a written authorization on this question.

### Post-Final-Order Considerations.

If the Department is appointed permanent managing conservator of the child, it may be some solace to be able to tell your client that the court has the discretion to order time-limited reunification services for parents even after PMC is awarded to the Department if the court determines that such services are appropriate. *See* Texas Family Code 263.503(b), as amended by S.B. 939, 81st Leg., R.S. (2009) [Effective immediately]. You should be prepared to make your case on this issue during your representation of the parent post-final-order, if appropriate. When this seems appropriate only after the child has been in the Department's care for years, it may be the child's attorney or guardian ad litem who request this relief from the court; or the court may inquire into whether such services appear appropriate.

### Appeals in CPS Cases

*Appeals in CPS Cases are Accelerated:* An appeal of a final order rendered in a CPS termination case is governed by the rules for accelerated appeals in civil cases and the procedures provided in §263.405.<sup>182</sup> Under the rules for accelerated appeals you have 20 days from the date the judgment is signed to file the notice of appeal to perfect your appeal.<sup>183</sup>

*Where do I file the notice of appeal?* File the original notice of appeal with the trial court clerk.<sup>184</sup>

*What if I filed the notice of appeal in the wrong court?* If you mistakenly file the notice of appeal with the clerk of the appellate court, the notice is deemed to have been filed with the trial court clerk the same day.<sup>185</sup> The appellate-court clerk will send a copy of the notice of appeal to the trial-court clerk.<sup>186</sup>

*Post-trial Motions:* A post-trial motion or request for findings of fact and conclusions of law will not extend the time to file the notice of appeal or the affidavit of indigence.<sup>187</sup>

*Exception: Motion for extension of time to file notice of appeal:* The court of appeals may extend the time to file the notice of appeal if, within 15 days after the deadline to file notice of appeal, the appealing party files the notice of appeal and a motion for extension of time that complies with TRAP 10.5(b).<sup>188</sup> Further, if the appellant files only the notice of appeal within 15 days of the date it was due, the filing of the notice of appeal implies a motion requesting an extension.<sup>189</sup> This does not eliminate the need to explain the late filing.<sup>190</sup>

*Deadline to file Motion for New Trial and Statement of Points on Which the Party Intends to Appeal:* Not later than the 15th day after the date a final order is signed by the trial judge, a party who intends to request a new trial or appeal the order must file with the trial court: (1) a request for a new trial; or (2) if an appeal is sought, a statement of the point or points on which the party intends to appeal.<sup>191</sup> The statement of points and the motion for new trial may be combined.<sup>192</sup>

*Motion for Extension of Time to File Statement of Points on Which Party Intends to Appeal:* A party may file a written motion to extend the time for filing her statement of points on appeal.<sup>193</sup> Practitioners are urged to read

<sup>182</sup> Tex. Fam. Code § 263.405.

<sup>183</sup> Tex. R. App. P. 26.1(b).

<sup>184</sup> *Id.* 25.1(a).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Tex. Fam. Code § 263.405c; Tex. R. App. P. 28.1, 28.2; *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005).

<sup>188</sup> Tex. R. App. P. 26.3.

<sup>189</sup> *Verburgt v. Dornier*, 959 S.W.2d 615, 617 (Tex. 1997).

<sup>190</sup> *Jones v. City of Houston*, 976 S.W.2d 676, 677 (Tex. 1998); *Kidd v. Paxton* 1 S.W.3d 309, 310 (Tex. App. – Amarillo 1999, pet. writ denied).

<sup>191</sup> Tex. Fam. Code §263.405(b). [Effective for cases filed on or after June 16, 2007, only].

<sup>192</sup> *Id.*

<sup>193</sup> *See In the Interest of M.N., a Child*, 262 S.W.3d 799 (Tex. 2008)(trial court did not abuse discretion in granting mother's motion to extend time for filing statement of points of appeal; statement of points timely filed).



this case to acquaint themselves with the time-frame in which the appellant filed the motion for extension, and be aware of the requirement to show good-cause for the failure to timely file the statement of points.<sup>194</sup> To establish “good cause” for an extension of time to file the statement of points on appeal, the Texas Supreme Court applied the standard of Texas Rule of Civil Procedure 5, as set forth in *Carpenter v. Cimarron Hydrocarbons Corp.*:

by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the [opposing party].”<sup>195</sup>

***Consequences of Failure to File Statement of Points:*** The consequences for failure to file the statement of points, or an incomplete statement of points, are draconian. Any points not raised in the statement of points are not preserved for review.<sup>196</sup>

There are only two exceptions to this blanket waiver: 1) a parent may raise an ineffective-assistance-of-counsel claim for the first time on appeal; and 2) section 263.405(i) is unconstitutional as applied when it precludes a parent from raising a meritorious complaint about the insufficiency of the evidence supporting the termination order.<sup>197</sup>

**» NOTE :** For a well-written dissent discussing the right to effective assistance of counsel in parental-rights termination cases, and egregious examples of ineffective assistance of counsel, see *Walker v. Department of Family & Protective Services*, 2009 Tex. App. LEXIS 4508, Tex. App. – Houston [Houston [1st Dist.], June 18, 2009) (dissenting opinion Justice Jennings).

***Specificity Required to Preserve Sufficiency of the Evidence Challenges:*** A claim that a judicial decision is contrary to the evidence, or that the evidence is factually or legally insufficient, is not sufficiently specific to preserve an issue for appeal.<sup>198</sup>

**» NOTE :** The continuing viability of 263.405(i) is questionable in light of the Texas Supreme Court’s holding in *J.O.A.*, that §263.405(i) is unconstitutional as applied when it precludes a parent from raising a meritorious complaint about the insufficiency of the evidence supporting the termination order.<sup>199</sup>

***Request for Record on Appeal; Affidavit of Indigence:*** There are a number of other procedural steps you must complete by the 20-day deadline to file the notice of appeal, such as making the requests for the appellate record, and filing the affidavit of indigence.<sup>200</sup>

<sup>194</sup> See *Id.*

<sup>195</sup> *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 688 (Tex. 2002); see also *Monica Ramirez v. Texas Department of Family & Protective Services*, No. 03-08-00021-CV, No. 03-08-00150 (Tex. App. – Austin, September 11, 2008) (Memorandum Opinion abating appeal); rev’d and remanded, *Monica Ramirez v. Texas Department of Family & Protective Services*, No. 03-08-00021-CV, No. 03-08-00150-CV, Tex. App. – Austin, October 7, 2008 (Memorandum Opinion).

<sup>196</sup> Tex. Fam. Code § 263.405i; *In the Interest of J.H.*, 2007 Tex. App. LEXIS 407 (Tex. App. – Tyler, January 24, 2007 no pet.).

<sup>197</sup> *In the Interest of J.O.A.*, et. al, 2009 Tex. LEXIS 250 (May 1, 2009); In re B.T., 154 S.W.3d 200, 205 (Tex. App. – Fort Worth 2004, no pet.).

<sup>198</sup> Tex. Fam. Code § 263.405i; *Adams v. Texas Department of Family & Protective Servs.*, 236 S.W.3d 271 (Tex. App. – Houston [1st Dist.] February 22, 2007). For examples of decisions where the courts of appeals have reviewed claims of legal and factual insufficiency of the evidence that were found sufficiently specific, see *In the Interest of S.K.A.*, 237 S.W.3d 875 (Tex. App. – Texarkana, 2007, pet. denied); *In the Interest of J.A.B.*, 2007 Tex. App. LEXIS 8294 (Tex. App. Fort Worth, October 18, 2007).

<sup>199</sup> *In the Interest of J.O.A.*, et. al, 2009 Tex. LEXIS 250 (May 1, 2009)

<sup>200</sup> Tex. Fam. Code § 263.405c; Tex. R. App. P. 20.1c (affidavit of indigence), Tex. R. App. P. 34.5 (clerk’s record), Tex. R. App. P. 34.6 (reporter’s record).

» **NOTE :** A new affidavit of indigence is required on appeal. You cannot rely on the affidavit of indigence used to qualify for a court-appointed attorney at the trial court level.<sup>201</sup>

» **NOTE :** Even though Tex. R. App. P. 13.1 requires the court reporter to make a record of the court proceedings unless excused by the parties, you do not have an automatic right to raise this failure on appeal. In *Hagood v. Fishborn, Inc.*, the appellant failed to request that a record be made of handwritten questions submitted to the court by the jury. Appellant complained on appeal of the absence of the questions from the record. The Dallas Court of Appeals noted the tension between Tex. R. App. P. 13.1 and Tex. Gov't Code 52.046 (providing that the reporter must record the proceedings "on request"). The Dallas Court held that appellant's failure to request that a record be made of the handwritten questions submitted to the court by the jury prevented appellant from complaining about the absence on appeal.<sup>202</sup>

*New Trial, Indigence & Frivolous Appeals:* The trial court shall hold a hearing not later than the 30th day after the date the final order is signed to determine whether: (1) a new trial should be granted; (2) the party's claim of indigence should be sustained; and (3) the appeal is frivolous.<sup>203</sup> In determining whether an appeal is frivolous, the court may consider whether the appellant has presented a substantial question for appellate review.<sup>204</sup>

*If a new trial is granted:* If the trial court renders final judgment before the one-year statutory deadline, but subsequently grants a motion for new trial, the dismissal deadline can come back into play in the case. If a new trial is set on a date after the original dismissal deadline, the trial court should extend the dismissal deadline and commence the new trial before expiration of the extended dismissal deadline. If the trial court fails to do so, the parent can move to dismiss the case.<sup>205</sup> The fact that the parent requests the new trial and consents to continuances that allow the trial court to miss the statutory deadline does not negate the parent's right to dismissal.<sup>206</sup>

*What can you do if the court decides your client is not indigent or that the appeal is frivolous?* The appellant may appeal the court's order denying the appellant's claim of indigence or the court's finding that the appeal is frivolous.<sup>207</sup> The time-line to appeal from the Court's decision that your client is not indigent, or that the appeal is frivolous, is not later than 10 days after the date the court makes the decision.<sup>208</sup> Courts of appeal are split on the question whether review of the trial court's finding that the appeal is frivolous is limited to the evidence presented at the 263.405(d) hearing.<sup>209</sup> If the appeal claimed factual and legal insufficiency of the evidence, it seems that review of the 263.405(d) hearing would require a review of the trial record.

<sup>201</sup> Tex. R. App. P. 20.1(c)(1).

<sup>202</sup> *Hagood v. Fishborn, Inc.*, 2009 Tex. App. LEXIS 742 (Tex. App. – Dallas, Feb. 5, 2009, pet. for review filed).

<sup>203</sup> Tex. Fam. Code § 263.405(d), (e); CPRC 13.003(a).

<sup>204</sup> CPRC 13.003(b); *In the Interest of K.D.*, 202 S.W.3d 860, 865 (Tex. App. – Fort Worth 2006, no pet.) (A proceeding is frivolous when it lacks an arguable basis either in law or in fact), citing *De La Vega v. Taco Cabana*, 974 S.W.2d 152 (Tex. App. – San Antonio 1998, no pet.).

<sup>205</sup> *See In re Dep't of Family & Protective Services*, 273 S.W.3d 637 (Tex. 2009) (trial court abused its discretion in not dismissing case because final order was not rendered before statutory deadline following grant of new trial).

<sup>206</sup> *Id.*

<sup>207</sup> *See* Tex. Fam. Code § 263.405(g) (setting out the procedure to do so).

<sup>208</sup> *Id.* § 263.405(g).

<sup>209</sup> *Compare, In the Interest of K.D.*, 202 S.W.3d at 865 (review is limited to record of § 263.405 hearing), with, *Castillo v. Texas Dept. Of Family & Protective Servs.*, 2006 Tex. App. LEXIS 6700 (Tex. App. – Austin, July 28, 2006) (court of appeals considers evidence presented at trial).

What if you believe your client's appeal is Frivolous? Several Texas courts of appeal have held that it is appropriate to file a brief in accordance with the procedures outlined in *Anders v. California*.<sup>210</sup> *Anders* held that an appointed defense attorney in a criminal case who examines the record and determines that an appeal is frivolous and lacks merit must so advise the appellate court and then set forth any possible issues and applicable law that might arguably support the appellant's position.<sup>211</sup> Counsel must also deliver a copy of the brief and the appellate record to the client and notify him/her of their right to file a pro se brief.<sup>212</sup> Counsel must also request withdrawal.<sup>213</sup>

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<sup>210</sup> See *Taylor v. Texas Dept. of Protective and Regulatory Services*, 160 S.W.3d 641, 646-47 (Tex. App. – Austin 2005, pet. denied); *In re D.E.S.*, 135 S.W.3d 326, 329 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *In re K.D.*, 127 S.W.3d 66, 67 (Tex. App. – Houston [1st Dist.] 2003, no pet.); *Porter v. Texas Dept. of Protective and Regulator Services*, 105 S.W.3d 52, 56 (Tex. App. – Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774, 777 (Tex. App. – Fort Worth 2003, no pet.); *In re E.L.Y.*, 69 S.W.3d 838, 841 (Tex. App. – Waco 2002, no pet.); *In re K.S.M.*, 61 S.W.3d 632, 634 (Tex. App. – Tyler 2001, no pet.); *In re A.W.T.*, 61 S.W.3d 87, 88 (Tex. App. – Amarillo 2001, no pet.) see also *In re J.B.*, 2009 Tex. App. LEXIS 526 (Tex. App. – El Paso Feb. 5, 2009, no pet. h.) (holding *Anders* is applicable in an appeal from a termination of parental rights where court appointed counsel has determined that the appeal is frivolous).

<sup>211</sup> *Anders v. California*, 386 U.S. at 741-44.

<sup>212</sup> See authorities cited in f.n. 221.

<sup>213</sup> See *In the Interest of K.D.*, at 67; *In re K.M.* at 777.

The American Bar Association has established standards of practice for lawyers who represent Child Welfare Agencies.<sup>1</sup> These standards identify two separate models of representation. The first is the agency representation model. In this role, the attorney is typically an employee of the agency and represents the agency in the same way that an in-house attorney represents a corporation. A variation on this model is where the attorney is from a separate governmental agency but the agency is clearly the client. The Standards argue that the benefits of this model are the central reliance and value placed upon the agency and caseworkers as the expert within the case and greater consistency in the application of the law. Attorneys can become familiar with the statutory framework the agency operates in and its policies and procedures.

The second model is the Prosecutorial Model. Under this model the district or county attorney appears on behalf of the agency, but represents the people of the state. This attorney, as an independent actor, may override the views of the agency in court. This model may assure the better application of community standards. Issues of concern with this model are the lack of voice that the caseworker may have in court. The agency's or caseworker's expertise within the field and knowledge of the facts of the case may be ignored. Politics or personal beliefs may intrude on the representation. The attorney may handle a wide range of issues and therefore may not have much knowledge or experience with child welfare law. In the prosecutorial model the attorney rarely acts in the counselor role on policy issues within the agency. There are potential conflicts in related cases that may arise out of the same facts and families.

The standards caution states against creating a hybrid model. While it may be argued that Texas has in fact done so, it has not actually integrated the two models but created a system of priorities that allow for the use of one or the other models on a case-by-case basis. The statutory preference appears to be a prosecutorial model. The county attorney in the county where the suit is brought must represent the department unless the district attorney or criminal district attorney elects to provide representation<sup>2</sup>. If the district and county attorney are unable to represent the department "because of a conflict of interest or because special circumstances exist," the representation falls to the attorney general of the state.<sup>3</sup> If the attorney general is unable to represent the department then the attorney general may deputize a third party to represent the department. This is where the model appears to shift to an agency representation model. The deputized attorney may be a contractor or an employee of the department.<sup>4</sup> The end result of this statutory scheme is that representation for Department is handled by a wide variety of entities from county to county across the state. Since the amendment of Texas Family Code Section 264.009 in 1997, the Office of the Texas Attorney General has opted not to represent the agency and has routinely deputized agency attorneys to handle representation in counties that decline to handle or that have a conflict with cases, resulting in the Department currently handling direct representation in over 160 counties, including counties where there is some shared responsibility for cases between the Department and local prosecutors. It is interesting to note that the recommendation of the ABA committee that drafted the standards is the agency representation model. Such a model in Texas, if clearly adopted and implemented, would likely lead to greater consistency.

The standards of practice apply no matter the model of representation. The standards have categorized the obligations of attorney under five broad categories: general; advise and counsel; court preparations; hearings;

<sup>1</sup> Please see: <http://www.abanet.org/child/agency-standards.pdf>

<sup>2</sup> Tex. Fam. Code § 264.009 (a). In Harris County "the attorney who represents the state in civil cases in the district or county court," which is the Office of the County Attorney, represents the department. *Id.* § 264.009(f).

<sup>3</sup> Tex. Fam. Code § 264.009 (b).

<sup>4</sup> *Id.* § 264.009 (c).

and, post hearing or appeals. The obligations of the attorney, while not deemed to be completely comprehensive are as follows:

### **General**

- 1) Fully understand and comply with all relevant federal and state laws, regulations, policies, and rules;
- 2) Promote timely hearings and reduce case continuances;
- 3) Protect and promote the agency's credibility;
- 4) Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/agency;

### **Advise and Counsel**

- 5) Counsel the client/agency about all legal matters related to individual cases as well as policy issues and periodically monitor cases;

### **Court Preparation**

- 6) Develop a case theory and strategy to follow at hearings and negotiations;
- 7) Prepare or help prepare the initial petition and all subsequent pleadings;
- 8) Timely file all pleadings, motions, and briefs;
- 9) Obtain all documents and information needed, including copies of all pleadings and relevant notices filed by other parties;
- 10) Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings;
- 11) Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate;
- 12) Develop a case timeline and tickler system;
- 13) Subpoena and prepare all witnesses, including the client;
- 14) Ensure proper notice is provided to all parties and necessary caretakers;

### **Hearings**

- 15) Attend and prepare for all hearings;
- 16) Prepare and make all appropriate motions and evidentiary objections;
- 17) Present case in chief, present and cross-examine witnesses, prepare and present exhibits;
- 18) In jurisdictions in which a jury trial is possible, participate in jury selection and drafting jury instructions;
- 19) Request the opportunity to make brief opening and closing arguments when appropriate;
- 20) Prepare or help prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision;

### Post Hearings/Appeals

- 21) Follow all court orders pertaining to the attorney for the client/agency;
- 22) Review court orders to ensure accuracy and clarity and review with agency when necessary;
- 23) Take reasonable steps to ensure the agency complies with court orders;
- 24) Consider and discuss with the agency the possibility of appeal;
- 25) If a decision is made to appeal, timely file the necessary post-hearing motions and the notice to appeal paperwork;
- 26) Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending;
- 27) Communicate the results of the appeal and its implications to the agency/client.

### Role of the DFPS Regional Attorney

The department has staff attorneys in each of its 11 designated regions.<sup>5</sup> In over 160 Texas counties, these attorneys are the primary representatives of the department in court, either for all suits or in cases when the local prosecutor has a conflict. Whether they provide in-court representation, these attorneys fulfill many different functions including:

- Reviewing open records requests
- Reviewing and referring or handling citizenship and immigration issues
- Participating in administrative hearings, such as SSI hearings
- Dealing with subpoenas and discovery directed at the department
- Assisting with Indian Child Welfare Act issues
- Training DFPS staff and serving as a liaison and resource for local prosecutors who represent the department
- Participating in legal staffings with caseworkers

**What can you expect from the regional attorney?** DFPS attorneys can be a resource for information and a source of legal advice and guidance to caseworkers in evaluating cases, discussing options and strategies. The department has developed an automated system for preparation of best practice pleadings that is updated following each legislative session and distributed to all prosecutors who represent the department. Whether you are an AAL, prosecuting attorney or parents' attorney, the DFPS regional attorney may be a valuable resource for communicating legal issues to the caseworkers. In addition, these attorneys are available for consultation on the specialized proceedings listed above.

<sup>5</sup> Please see: <https://www.dfps.state.tx.us/documents/about/pdf/regboundcounty.pdf>





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## CHAPTER 8 Evidence

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### Evidentiary Issues

While the Texas Rules of Evidence apply to cases affecting the parent/child relationship as they would in all other civil proceedings,<sup>1</sup> there are certain practices and specific provisions of the Texas Family Code that affect the full implementation of the rule of evidence. Many proceedings, depending on their type, through the course of a particular case are more informal than a typical court proceeding. Courts often handle proceedings without sworn testimony or actual evidence being presented. Many courts want to develop a dialogue among participants in order to achieve results that will be in the best interest of the child. It is incumbent upon the advocate to request or insist on a more formal presentation before the court when a more formal proceeding would be in the best interest of his or her client. For example at the 14 day full adversarial hearing, the attorney may wish for a formal hearing while allowing a more informal hearing during a status hearing.

Chapter 104 of Texas Family Code contains evidentiary provisions allowing for certain evidence and for the presentation of evidence in a manner that would ordinarily be precluded by the rules of evidence. These unique rules of evidence generally apply to children under the age of 12 years old and are intended to protect the child from being further traumatized by the trial or hearing while at the same time allowing for the presentation of evidence from them.

## Methods of Testimony

### Electronic Testimony by a Child

The Texas Family Code provides a special set of evidentiary rules that apply to suits affecting the parent-child relationship.<sup>2</sup> The Family Code provides for three types of electronic testimony in lieu of live in-court testimony by a child under the age of 12.<sup>3</sup> The Code also provides that these methods can be used for a child of any age if the child is incapable of testifying in open court due to a medical condition.<sup>4</sup> The determination of whether alternative forms of testimony are necessary to protect child witnesses from the trauma of testify in court should be made on a case by case basis.<sup>5</sup> In making a determination of whether alternative forms of testimony are necessary to protect child witnesses from the trauma of testifying in court, courts should consider whether: (a) use of a video is necessary to protect the welfare of the child; (b) the trauma to the child comes from exposure to the abuse, rather than from the courtroom generally; and (c) the emotional distress to the child would be more than minimal.<sup>6</sup>

If the court permits testimony of a child to be taken as provided in Chapter 104, the child may not be compelled to testify in court during the proceeding.<sup>7</sup> The right to confront witnesses applies only to criminal proceedings and not to termination of parental rights cases, and thus, challenges on confrontation grounds will not be successful.<sup>8</sup>

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<sup>1</sup> See Tex. Fam. Code § 104.001.

<sup>2</sup> See *Id.* § 104 (Evidence).

<sup>3</sup> *Id.* §§ 104.002, 104.003, 104.004.

<sup>4</sup> *Id.* § 104.005(b).

<sup>5</sup> *In Interest of R.V., Jr.*, 977 S.W.2d 777 (Tex. App. – Fort Worth 1998).

<sup>6</sup> *Id.*

<sup>7</sup> Tex. Fam. Code § 104.005(a).

<sup>8</sup> *In re C.W.*, 65 S.W.3d 353 (Tex. App. – Beaumont 2001).

**Prerecorded statement of a child**

If a child 12 years of age or younger is alleged to have been abused, the recording of an oral statement of the child made prior to the proceeding may be admissible, if the following conditions are met:<sup>9</sup>

- 1) no attorney for a party was present at the time the recording was made;
- 2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- 3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- 4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
- 5) each voice on the recording is identified;
- 6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
- 7) each party is afforded an opportunity to view the recording before it is offered into evidence.

Most importantly and the area that may create the greatest opportunity for challenge, the statements cannot be made in response to leading questions or an atmosphere that encourages certain answers.<sup>10</sup> Courts will exclude tapes that are made in violation of this provision.<sup>11</sup> It is permissible for a video to be edited to remove questions (and the corresponding answers) that have been determined to be impermissibly leading.<sup>12</sup> However, as the attorney, be mindful of the possibility that the leading nature of these questions may have influenced the responses to following questions, even if those questions were worded in the proper form. If this is the case, object that those later responses are also inadmissible as they were guided by the prior leading questions.

This provision can be used to admit into evidence videos made at Children's Advocacy Centers. For more information on the requirements applying to Children's Advocacy Centers, see Family Code Chapter 264, Subchapter E.

**Prerecorded Videotaped Testimony of Child**

The court may, on the motion of a party to the proceeding, order the testimony of the child be videotaped prior to a hearing or trial, so the child will not have to appear in court.<sup>13</sup> When testimony is being taken under this provision only one attorney for each party, the video operator and the attorney for the child or someone who would comfort and protect the child's well-being can be present.<sup>14</sup> The person operating video equipment should not be seen by the child.<sup>15</sup> Only the attorneys for the parties may question the child.<sup>16</sup> A parent acting pro se cannot question a child under this section. The court must ensure that:

- 1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- 2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
- 3) each voice on the recording is identified; and

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<sup>9</sup> Tex. Fam. Code § 104.002.

<sup>10</sup> *Id.* § 104.002(4).

<sup>11</sup> *Jones v. Tex. Dep't Human Servs.*, 836 S.W.2d 236 (Tex. App.- Texarkana 1992, no writ).

<sup>12</sup> *Tex. Dep't of Human Servs. v. White*, 817 S.W.2d 62 (Tex. 1991).

<sup>13</sup> Tex. Fam. Code § 104.003(a).

<sup>14</sup> *Id.* § 104.003(b).

<sup>15</sup> *Id.* § 104.003(d).

<sup>16</sup> *Id.* § 104.003(c).

- 4) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom.<sup>17</sup>

### Remote Televised Broadcast of Testimony of Child

The third type of video presentation is live testimony via closed circuit television.<sup>18</sup> If a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties.<sup>19</sup> The procedures that apply to prerecorded videotaped testimony of a child<sup>20</sup> apply to the remote broadcast of testimony of a child.<sup>21</sup>

## Electronic Testimony by a Professional

### Video Conferencing by Professional

The Texas Family Code provides that the court may allow certain professionals to appear via video conferencing rather than appearing in person in abuse and neglect matters brought by DFPS.<sup>22</sup> The term professional is very broad and includes all those with a mandatory obligation to report abuse under § 261.101(b).<sup>23</sup> The definition of “professional” includes teachers, nurses, doctors, day care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.<sup>24</sup>

The court may order that testimony of the professional be taken by videoconference, on agreement of counsel.<sup>25</sup> It must be a true video conference where all involved at both locations can hear and see each other during the testimony.<sup>26</sup>

## Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted.<sup>27</sup> The Texas Rules of Evidence provide that hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority.<sup>28</sup> Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.<sup>29</sup> Because hearsay is admitted if an objection is not timely made, it is vital that attorneys have a thorough understanding of the hearsay rule and are able to quickly recognize objectionable statements.

### Basic Hearsay Analysis:

- 1) **Is it a statement?**
- 2) **Was it made out of court?**
- 3) **Is it offered to prove the truth of the matter asserted?**
  - i) **What did the declarant assert to be true?**
  - ii) **What is the proponent trying to prove is true?**
  - iii) **Is the proponent offering the statement as the truth because the declarant said so?**

<sup>17</sup> *Id.* § 104.003(e).

<sup>18</sup> *Id.* § 104.004.

<sup>19</sup> *Id.* § 104.004(a).

<sup>20</sup> *Id.* § 104.003.

<sup>21</sup> *Id.* § 104.004(b).

<sup>22</sup> *Id.* § 104.007(b).

<sup>23</sup> *Id.* § 104.007(a).

<sup>24</sup> *See id.* § 261.101(b).

<sup>25</sup> *Id.* § 104.007(b).

<sup>26</sup> *Id.* § 104.007(c).

<sup>27</sup> *See* Tex. R. Evid. 801.

<sup>28</sup> *Id.* at 802.

<sup>29</sup> *Id.*

A “**statement**” is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.<sup>30</sup>

Note that “statement” includes nonverbal conduct. Whether or not the conduct is intended as a substitute for verbal expression will almost always be determined by circumstantial evidence. Key factors to the determination include *proximity* to a question asked and whether the conduct is *customarily used to communicate*.

The Texas definition differs somewhat from the federal definition of a “statement,” as the Texas definition omits the word “assertion.” Under the Federal Rule, something is not a “statement” unless the declarant intended to assert.<sup>31</sup> The Texas Rule includes a definition for “matter asserted,” which is not included in the Federal Rules. Under the Texas rule, “matter asserted” includes express and implied assertions. The result of the slight variance in language is that the Texas hearsay rule has a broader application, which includes conduct by an actor intended as a substitute for words but not intended as an assertion.

A “**declarant**” is a person who makes a statement.<sup>32</sup>

If the statement is not one by a person, it is not hearsay. For instance, results produced by a machine, like an E.K.G. print outs, are not hearsay. While there may be other authenticity issues like reliability of the machine, system and process, results produced by a machine are not statements by a person and are not hearsay. The purpose of the hearsay rule is that human statements are effected by human misinterpretation, misperception, dishonesty, and human ambiguity, and the credibility should be tested by being present in court in front of the jury and subject to cross examination. With a machine, these concerns do not exist.

Availability of a person to testify, alone, has no affect on hearsay. It may be relevant to admissibility of the hearsay statement if it fits under one of the hearsay exceptions in Rule 804. It is a common misconception that if a witness is available in court to testify, out of court statements are not hearsay, but that is not the case.

“**Matter asserted**” includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant’s belief as to the matter.

As discussed above, this variation in the Texas rules broadens the scope of what is hearsay. In Texas, an assumed implied assertion (not trying to say something indirectly but that fact must be assumed based on what was said) is hearsay.

“**Hearsay**” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

When a statement is not offered to prove the truth of the matter asserted, it is not hearsay. There are some situations where the statement is relevant because it was said, and not because it was necessarily true. For instance, if two people make a verbal contract, the words said create a deal making it relevant. Also, if defamation is alleged, the words said have importance, not the truth of the words said; in most every defamation case the person offering the statement will be asserting that the statement is not true. These types of **verbal acts** or **operative facts** are often termed “**res gestae**” meaning “the things done.”

Similarly, an out-of-court statement that would normally be hearsay can be used to impeach the witness because it is not used for the truth of the matter asserted. For example, if a statement was made to a CPS investigator by witness A and at trial witness A says the opposite, the statement to the investigator (which would normally be hearsay) can be used because it is not offered to prove that the statement was true, but rather to show that witness A has changed his story. As a practical matter, an attorney should only offer a prior statement to impeach in-court testimony when the prior statement was more helpful to his case.

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<sup>30</sup> *Id.* at 801(a).

<sup>31</sup> Fed. R. Evid. 801(a).

<sup>32</sup> Tex. R. Evid. 801(b).

A statement can also be offered not for the truth of the matter, but to show state of mind.<sup>33</sup> State of mind can be relevant in two situations:

- 1) Law requires a showing of mental state (e.g. mens rea, knowledge requirement, reasonableness of behavior, misrepresentation, malice);
- 2) Law permits showing of mental state as circumstantial evidence of conduct (e.g. whether person acted in self defense because he was threatened).

For instance in *Posner v. Dallas County Child Welfare Unit*, a witness testified that, while observing her four-year-old son and a friend playing with dolls, she overheard the friend say, “[G]ive me your doll, and I’ll show you with mine how daddies sex their little girls.”<sup>34</sup> The court held this testimony was not offered to prove the truth of the declarant’s statement as to how daddies “sex their little girls;” Rather, it was offered to show that J. made the statement which was relevant to the issue of her emotional well-being and state of mind.<sup>35</sup>

When a statement is not offered to prove the truth of the matter asserted, it is being offered for a limited purpose. Thus, if a statement is admitted that is harmful for your client, ask for a limiting instruction by the judge that the jury should not take the statement as the truth but only for the specific purpose for which it was admitted.

Hearsay issues come up frequently in CPS cases with regards to statements by children and testimony by the department. This manual will address the hearsay issues and exceptions that are particularly relevant in CPS cases. A comprehensive review of the hearsay rule is outside of the scope of this manual, but attorneys should review the hearsay rule prior to trial on any case.

In CPS cases, often the child does not testify and much of the department’s case is built on statements made by the child to others. For this reason, hearsay issues regarding the statements of children frequently arise. As stated, the Texas Rules of Evidence apply to CPS cases, and thus, all of the hearsay exceptions provided in the Rules of Evidence apply in these cases as well. Additionally, Texas Family Code Chapter 104 provides a special hearsay exception for suits affecting the parent-child relationship.

### **Texas Family Code § 104.006: Hearsay Statement of Child Describing Alleged Abuse**

Texas Family Code Chapter 104 provides, in a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child which would be inadmissible as hearsay may be admissible if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement’s reliability and:

- 1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law;<sup>36</sup> or
- 2) the court determines that the use of the statement in lieu of the child’s testimony is necessary to protect the welfare of the child.<sup>37</sup>

Even where a statement is not definite as to time, it is possible that the statement may be sufficiently reliable.<sup>38</sup>

<sup>33</sup> This should not be confused with the state of mind exception in Rule 803(3). Here we are talking about circumstantial evidence of state of mind, which is not hearsay because it is not offered to prove the truth of the matter asserted. Circumstantial evidence of someone’s state of mind could include that the person was told about an event or occurrence and had notice, that the person acted a certain way that he would not have unless he believed some particular thing to be true, or a person says something that he would not have said if he did not hold a certain belief to be true. Rule 803(3) is a hearsay exception that applies only if the declarant asserts his own state of mind.

<sup>34</sup> *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 587 (Tex. App. – Eastland 1990, writ denied).

<sup>35</sup> *Id.*

<sup>36</sup> Testimony “in any other manner provided for by law” may include calling the witness by a deposition taken in the same proceeding for any purpose as allowed by Texas Rule of Civil Procedure 203.6 and Texas Rule of Evidence 801(e)(3). See *Reed v. Tex. Dep’t of Protective & Regulatory Servs.*, 2002 Tex. App. LEXIS 1294 (Tex. App. Dallas Feb. 21 2002).

<sup>37</sup> Tex. Fam. Code § 104.006.

<sup>38</sup> Although a daughter’s outcry statements were not definite as to time, the specificity of the content and the circumstances existing at the time of the outcry demonstrated the statements’ veracity, there was evidence touching upon various indicia which courts often used to assess the reliability of a child’s outcry, for purposes of Tex. Code Crim. Proc. Ann. art. 38.072, and trial court did not err in determining that the daughter’s statements were reliable and in admitting them under Tex. Fam. Code Ann. § 104.006; the daughter was adamant about telling the truth, it was reasonable to deduce that a seven-year-old child like the daughter could describe the occurrences involved because she experienced them, there was no evidence that the daughter’s foster mother solicited information from the daughter, who was in the bathroom getting ready for school when the daughter started her outcry, the foster mother followed child protective services protocol by not asking the daughter any follow-up questions, by contacting child protective services, and by allowing the daughter’s therapist to question the daughter further, the foster mother’s testimony about the outcry was brief and not contrived, and the trial court implicitly found the foster mother credible. *In the Interest of M.R.*, 243 S.W.3d 807 (Tex. App. – Fort Worth 2007).



It is important to note however, that if the child is available, but does not testify, the court does not need to make a finding that the alternative testimony is necessary to protect the welfare of the child. It is availability and not the actual testimony that defeats the necessity for this additional finding by the court under Texas Family Code § 104.006.<sup>39</sup> This special provision for suits affecting the parent-child relationship differs from the normal hearsay rule.

## Non-Hearsay

Texas Rule of Evidence 801(e) provides that the following types of statements are not hearsay:

### Prior statement of a Witness

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:<sup>40</sup>

- A. inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;
- B. consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;<sup>41</sup>
- C. one of identification of a person made after perceiving the person; or
- D. taken and offered in a criminal case in accordance with Code of Criminal Procedure article 38.071.

Key to this rule is that the declarant must be a witness who testifies at the trial or hearing and is subject to cross examination concerning the statement.

### Statement of a Party Opponent

A statement is not hearsay when it is offered against the party and the statement is:

- A. the party's own statement in either an individual or representative capacity;
- B. a statement of which the party has manifested an adoption or belief in its truth;<sup>42</sup>
- C. a statement by a person authorized by the party to make a statement concerning the subject;
- D. a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
- E. a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.<sup>43</sup>

For example, if a parent said something that was overheard by witness A, the department could call witness A to testify to that out-of-court statement by the parent if the parent is a party in the case. Thus, any time at trial when an out-of-court statement by the parent or department is offered, be mindful that if offered by the opposite party it is not hearsay. However, a parent could not call a witness to testify to what that parent said because the statement must be offered against the party (i.e. offered by the opponent).

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<sup>39</sup> *In re K.L.*, 91 S.W.3d 1, 16 (Tex. App.- Fort Worth 2002, no pet.).

<sup>40</sup> Tex. R. Evid. 801(e)(1).

<sup>41</sup> If a prior consistent statement does not fit under Rule 801(e)(1)(B), the Texas Rules of Evidence expressly provide you cannot bring the statement in. Tex. R. Evid. 613(c).

<sup>42</sup> In some cases silence may manifest an adoption of the statement if it would be normal under the circumstances to protest the statement if untrue. Forwarding an email alone may not be enough to show the adoption of a statement as one's own, but where the email is accompanied by other language indicating an acceptance, it could be enough to show adoption.

<sup>43</sup> Tex. R. Evid. 801(e)(2).

The actual rule uses the language “admission by a party opponent,” rather than “statement.” The use of the word “admission” has no real significance. There is no requirement that the out-of-court statement admit to something that is detrimental to the party’s case.

### Deposition Taken in Same Proceeding

In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Rule of Civil Procedure 203.6(b).<sup>44</sup> “Same proceeding” is defined in the Texas Rules of Civil Procedure to include a proceeding in a different court with the same parties and issues.<sup>45</sup> Unavailability of deponent is not a requirement for admissibility.<sup>46</sup> Even after a witness has testified at trial, they may be called later by deposition. However, if the deponent makes a statement in the deposition that is hearsay (i.e. a statement of what someone else said), that statement must fit within one of the other hearsay exceptions to be admissible. In other words, this rule does not make all statements in the deposition non-hearsay.

## Hearsay Exceptions

Texas Rule 803 provides the following are not excluded by the hearsay rule, regardless of the availability of the declarant to testify as a witness.<sup>47</sup>

### Present Sense Impression

A “present sense impression” is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.<sup>48</sup> The rationale for the exception is that the contemporaneity of the statement with the event that it describes eliminates all danger of faulty memory and virtually all danger of insincerity.<sup>49</sup> The rule is predicated on the notion that “the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes” and is intrinsic rather than deliberate.<sup>50</sup> Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious “thinking-it-through” statements enter the picture, the present sense impression exception no longer allows their admission.<sup>51</sup> “Thinking about it” destroys the unreflective nature of a present sense impression.<sup>52</sup>

Answers of a 2½-year old child to questions of a caseworker, not long after the child had been scalded in the bathtub, as to who burned the child with the hot water, are admissible under the spontaneous exclamation exception to the hearsay rule.<sup>53</sup>

The key to qualifying for this exception is the amount of time that passes between the perception and statement. Whether the delay is too long depends on the circumstances. Courts have held that a time lapse of 30 minutes is too long to fit under the present sense impression exception.<sup>54</sup>

Additionally, the Texas Court of Criminal Appeals held that a recording of factual observations made by police officers investigating a suspected crime are not the type of “non-reflective” street-corner statements of objective observers that the present sense impression exception is designed to allow.<sup>55</sup> This same rational can be extended to the investigation of a CPS case if an agent of the department makes a statement for the purpose of creating a record to be used in a case.

<sup>44</sup> *Id.* at 801(e)(3).

<sup>45</sup> Tex. R. Civ. P. 203.6(b).

<sup>46</sup> Tex. R. Evid. 801(e)(3).

<sup>47</sup> *Id.* at 803.

<sup>48</sup> *Id.* at 803(a).

<sup>49</sup> *Fischer v. State*, 252 S.W.3d 375, 380 (Tex. Crim. App. 2008).

<sup>50</sup> *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545, 554 (1976).

<sup>51</sup> *Fischer*, 252 S.W.3d 375, 381 (Tex. Crim. App. 2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Woodard v. State*, 696 S.W.2d 622 (Tex. App. – Dallas 1985).

<sup>54</sup> *See Moore v. Drummet*, 478 S.W.2d 177 (Tex. Civ. App. Houston [14th Dist.] 1972, no writ).

<sup>55</sup> *Fischer*, 252 S.W.3d 375, 383 (Tex. Crim. App. 2008) (citing *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545, 554 (1976) (“It must be certain from the circumstances that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes.”)).

## Excited Utterance

There is also an exception to the hearsay rule for an excited utterance, which is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.<sup>56</sup> To fall within this exception, the declarant must have been under the influence of excitement when this statement was made. Here, time is not determinative, but it is relevant because the excitement fades with time.<sup>57</sup> To determine whether the exception should apply, consider whether the declarant was calm and collected or excited, nervous, and shaken. Circumstantial evidence is used to determine the declarant's state of mind at the time of the statement. This could include testimony that the declarant's eyes were red like he or she had been crying, the declarant was shaking, scared, hysterical, etc. Special attention should be paid to the tone and tenor of the individual's voice and whether the declarant had an opportunity to reflect prior to making the statement.<sup>58</sup> Close proximity in time will never be enough without some type of affirmative circumstantial evidence to show the declarant's condition. The exception can apply even where the statement is made in response to a question or interrogation, if the question causes the declarant to be overcome by emotion.

Courts in Texas have traditionally allowed witnesses to relate excited utterances made by children deemed incompetent to testify at trial.<sup>59</sup> The reliability of the hearsay statement stems from the spontaneity, and presumably outweighs any defects of capacity.

Compared to the present sense impression exception, the excited utterance allows for a broader subject matter, as it needs only to relate to the startling event or condition. The present sense impression must describe or explain the event or condition.

## Then Existing Mental, Emotional, or Physical Condition (State of Mind Exception)

The state of mind exception to the hearsay rule applies to a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.<sup>60</sup> The key to this exception is that the idea is "then existing," and not backwards looking. The state of mind must be expressed by the declarant about himself.

If an adult testifies that a child told such adult that he had been beaten, was afraid he would be beaten again, and had seen sexually explicit photographs, such testimony is admissible to show the child's state of mind.<sup>61</sup> However, testimony, with regard to the child's statement as to alleged sexual abuse, is not admissible under the hearsay exception for statements relating to one's "then existing state of mind, emotion, sensation, or physical condition," where the child is not expressing a current feeling, such as fear.<sup>62</sup>

## Statements for the Purpose of Medical Diagnosis or Treatment

Rule 803(4) provides an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.<sup>63</sup> This exception covers statements made by a patient, or loved one interested in obtaining an accurate diagnosis or treatment for the patient, to a doctor, nurse, or paramedic. However, the exception does not cover statements made by the doctor, nurse, or paramedic to the patient.

<sup>56</sup> Tex. R. Evid. 803(2).

<sup>57</sup> See *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003) (applying the exception to a statement made 20 hours after the exciting event).

<sup>58</sup> *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

<sup>59</sup> *Ortega v. State*, 500 S.W.2d 816 (Tex. Crim. App. 1973); *Carlson v. State*, 695 S.W.2d 695, 697 (Tex. App. – Dallas 1985, pet. ref'd) (mother allowed to testify as to "res gestae" statements of four-year-old child previously ruled incompetent to testify).

<sup>60</sup> Tex. R. Evid. 803(3).

<sup>61</sup> *Baxter v. Tex. Dep't of Human Res.*, 678 S.W.2d 265 (Tex. App. – Austin 1984).

<sup>62</sup> *Ochs v. Martinez*, 789 S.W.2d 949 (Tex. App. – San Antonio 1990), writ denied, (Oct. 3, 1990). See also *James v. Tex. Dep't of Human Servs.*, 836 S.W.2d 236 (Tex. App. – Texarkana 1992). But see *In Interest of W.S.*, 899 S.W.2d 772 (Tex. App. – Fort Worth 1995).

<sup>63</sup> Tex. R. Evid. 803(4).

The reliability in the statement comes from the incentive of the patient to be honest in describing his or her condition to the medical professional in hopes of getting accurate diagnosis or treatment. Generally, statements as to fault do not qualify under the exception, as it is not “reasonably pertinent” to diagnosis or treatment. However, where a child tells a medical professional the person who abused him or her, the statement is reasonably pertinent to diagnosis or treatment, and the statement is admissible under this exception.<sup>64</sup> At least one court has held that where a child is too young to appreciate the need to be truthful to a medical professional to get treatment, the exception should not apply.<sup>65</sup> However that case can be distinguished because the statement was made by the child to a child therapist regarding the person who harmed his grandparents.<sup>66</sup>

### Recorded Recollection

A recorded recollection is a memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document’s trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.<sup>67</sup>

This exception involves a document reflecting the witness’ prior statement because the witness does not remember and his memory cannot be refreshed; however the witness can vouch for the veracity of the document. The person who made the recording (the declarant) must be a witness. Also, the witness must have had knowledge of the thing recorded at the time it was made. If it meets this test, the document can be read to the jury but *cannot* be admitted as an exhibit. For instance, if a witness wrote down the license plate number of the car she saw in a hit and run, the past recorded recollection exception can be used. This is different from using the document to refresh present recollection because even if the witness saw the numbers again on the paper she has no independent memory of the numbers, just the memory that she wrote them down.

The department may try to rely on this exception to allow a caseworker to use notes to testify on a case. Because turnover in a case is so high, it is very likely that the caseworker at the time of trial was not the one making the notes in the beginning of the case. You can object to the use of the document by the witness, as the witness cannot verify the writing and the witness has no memory of creating the recording because someone else made it.

### Business Records Exception

The business records except applies to a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.<sup>68</sup>

64 See *Tissier v. State*, 792 S.W.2d 120 (Tex. App. – Houston [1st Dist.] 1990), pet. for discretionary rev. ref’d, (Sept. 19, 1990) (The testimony of the child’s treating physician, regarding the child’s statement that his parent had hit him in the stomach and later told the child not to tell anyone about it, is admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment.); *In Interest of L.S.*, 748 S.W.2d 571 (Tex. App. – Amarillo 1988) (A sexual assault nurse who examined a child abuse victim is properly permitted to testify in termination proceedings as to statements made by the child identifying the abuser and the nature of the abuse, as the cause of the child’s injuries are pertinent to both the physical and psychological treatment and diagnosis).

65 *Powell v. State*, 88 S.W.3d 794, 798 (Tex. App. – El Paso 2002) (Statements made by three-year-old to child therapist, that defendant hurt his grandparents, were not pertinent to medical diagnosis or treatment, and thus, constituted impermissible hearsay, in capital murder trial, absent any evidence that great-grandson understood he was seeing therapist for purposes of seeking treatment for his trauma, or that he *understood the importance of being truthful*) (*emphasis added*).

66 *Id.*

67 Tex. R. Evid. 803(5).

68 *Id.* at 803(6).

**Business Records Predicate:**

- 1) **Was Exhibit [#\_\_] made by, or from information transmitted by, a person with knowledge of the events or conditions recorded?**
- 2) **Was the record made at or near the time of the events or conditions recorded?**
- 3) **Was it in the regular course of your business to make such records?**
- 4) **Was it in the regular course of your business to keep such records?**

The sponsoring witness, through which the documents are brought into evidence, need not have personal knowledge of the events recorded. The witness only needs to have knowledge to authenticate the document (tell what it is) and answer the four predicate questions. It could be a records custodian or other qualified witness.

An affidavit can be used, in place of a witness, to authenticate and prove up a statement under the business records exception, pursuant to Texas Rule of Evidence 902(10). If this method is used, offer the records with the self proving affidavit attached.

“Business” as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.<sup>69</sup> It can even apply to records maintained by an individual, such as the balance sheet of a personal checkbook. The records do not need to be a written record on paper. They can include data compilations, memos, and reports.

The records can contain opinions or diagnosis, and it is not necessary that it be based on probability to be admissible under the business records exception. “Medical probability” of an opinion goes to the sufficiency of the evidence, but not to the admissibility.

Recordings of hearsay within the business records must meet some other theory of admissibility.<sup>70</sup> When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception.<sup>71</sup> Those statements must independently qualify for admission under their own hearsay exception — such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent.<sup>72</sup>

In the case of *Garcia v. State*, the Court of Criminal Appeals considered whether a record made by a battered women’s shelter recording a woman’s statement that she had been abused fit under the business records exception.<sup>73</sup> The Court held the records themselves were admissible, but that does not mean that all information, from whatever source or of whatever reliability, contained within those business records is necessarily admissible.<sup>74</sup> The Court explained the woman’s out-of-court statements to an employee at the Battered Women’s Shelter did not lose their hearsay status simply because the employee had a business duty to accurately record what she said.<sup>75</sup> The Court provided the example that a delusional person might call Crimestoppers to report that George Washington was cutting down a cherry tree on the Capitol grounds, and although Crimestoppers has a business duty to accurately record all incoming calls and to keep the records as part of its business records, the caller had no business duty to report accurately.<sup>76</sup> His statements may be contained within a business record, but they are not admissible to establish the fact that George Washington was, in fact, cutting down a cherry tree, although they would be admissible to establish that the person did call and make a report of some type on a given day.<sup>77</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> For instance, if medical records show that the doctor recorded that the patient said he had a back ache, what the patient said is still hearsay. However, in this example, the hearsay within the business records (a statement made to a doctor in effort to obtain treatment) fits under another hearsay exception.

<sup>71</sup> *Garcia v. State*, 126 S.W.3d 921, 926-927 (Tex. Crim. App. 2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 927, n.2.

<sup>77</sup> *Id.* (citing *See Crane v. State*, 786 S.W.2d 338, 353-54 n.5 (Tex. Crim. App. 1990) (sheriff’s department’s tape recordings of defendant’s telephone calls from jail to family members did not qualify for admission under Rule 803(6) because defendant had no business duty to make the statements, he was aware that he was being recorded, and such statements were “self-serving” hearsay which lacked “fundamental trustworthiness”).

The business records exception does not apply to records made with an eye toward litigation.<sup>78</sup> In *Palmer v. Hoffman*, the U.S. Supreme Court held that accident reports routinely created by a railroad company did not qualify under the business records exception, explaining that unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business; their primary utility is in litigating, not in railroading.<sup>79</sup>

On the flip side of the business records rule, the absence of an entry in business records is an exception to the hearsay rule and can be admitted to prove the nonoccurrence or nonexistence of the matter.<sup>80</sup>

### Public Records and Reports

The following fall within a hearsay exception — records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

- A. the activities of the office or agency;
- B. matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
- C. in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.<sup>81</sup>

Neither regularity nor contemporaneity is required to qualify a document as a public record. The predicate is laid by showing that the document is authenticated and involves one of the situations enumerated in the rule.<sup>82</sup> Official reports “in any form,” as provided in Texas Rule of Evidence 803(8), includes both written and oral reports, if the oral report was made pursuant to a legal duty to report the matter in question.<sup>83</sup> In *Texas Department of Public Safety v. Bonds*, the court found that the public records and reports exception applied and admitted oral and documentary statements of the arresting officer regarding what he had been told by another officer concerning the initial stop of a motorist.<sup>84</sup> If self-authentication provisions of Texas Rule of Evidence 902 are satisfied, the records or reports may be admissible even without a testifying witness.<sup>85</sup>

### Records of Vital Statistics

The rules provide an exception for records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.<sup>86</sup>

### Reputation Concerning Personal or Family History

An exception to the hearsay rule applies to statements regarding reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.<sup>87</sup>

<sup>78</sup> *Palmer v. Hoffman*, 318 U.S. 109 (1943).

<sup>79</sup> *Id.*

<sup>80</sup> Tex. R. Evid. 803(7).

<sup>81</sup> *Id.* at 803(8).

<sup>82</sup> *Cowan v. State*, 840 S.W.2d 435, 437 & footnote 7 (Tex. Crim. App. 1992) (en banc).

<sup>83</sup> *Tex. Dep’t of Pub. Safety v. Bond*, 955 S.W.2d 441, 445-46 (Tex. App. – Fort Worth 1997, no pet.).

<sup>84</sup> *Id.*

<sup>85</sup> *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997) (holding there is no foundation requirement for the public records exception).

<sup>86</sup> Tex. R. Evid. 803(9).

<sup>87</sup> *Id.* at 803(19).



### **Reputation as to Character**

Similarly, there is an exception applying to statements regarding reputation of a person's character among associates or in the community.<sup>88</sup>

### **Judgment of Previous Conviction**

In civil cases, an exception to the hearsay rule applies to evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), judging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal cases, evidence of a judgment, entered after a trial or upon a plea of guilty or *nolo contendere*, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.<sup>89</sup>

### **Judgment as to Personal, Family, or General History, or Boundaries**

Similarly, an exception applies to judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence at trial.<sup>90</sup>

### **Statement Against Interest**

A hearsay exception also exists for a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.<sup>91</sup>

For instance, if a child's uncle makes a statement that he sexually abuses the child all the time and the parents do not care, this statement could be admitted as a statement against interest.

### **Other Hearsay Exceptions**

There are many other hearsay exceptions under Rule 803 that are not covered by the scope of this manual. Additionally, there are exceptions in Texas Rules of Evidence 804, which apply when a witness is unavailable to testify. These rules should be reviewed prior to trial.

### **Personal Knowledge**

A lay witness must have personal knowledge of the facts on which he or she testifies. The justification of this rule is to ensure witness competence, as second hand knowledge is prone to inaccuracies. The Texas Rules of Evidence provide that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.<sup>92</sup> There is no presumption of personal knowledge. The party offering the witness has the burden of production to show predicate facts.<sup>93</sup> Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.<sup>94</sup>

The requirement of personal knowledge is somewhat related to and works in conjunction with the hearsay rule, as both work to ensure you have the best person in the court room to testify.

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<sup>88</sup> *Id.* at 803(21).

<sup>89</sup> *Id.* at 803(22).

<sup>90</sup> *Id.* at 803(23).

<sup>91</sup> *Id.* at 803(24).

<sup>92</sup> *Id.* at 602.

<sup>93</sup> The burden on the offering party is only a burden of production because assessing and weighing the evidence is left for the jury.

<sup>94</sup> Tex. R. Evid. 602.

The issue of lack of personal knowledge commonly arises where a lay witness tries to testify to how they think another person felt or what another person thinks.<sup>95</sup> Here, the proper objection is on the grounds of speculation.

Expert witnesses are not required to have personal knowledge. As the Texas Rules of Evidence provide, the rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.<sup>96</sup>

### Opinion Testimony by Lay Witnesses

As discussed, lay witnesses are not permitted to speculate. However, Texas Rule of Evidence 701 allows a lay witness to testify to opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Subsection (a) requires that the inference or opinion must be based on first hand knowledge. Thus, it cannot be based on hypothetical facts. Additionally, it must be a rational and reasonable opinion or inference. Thus, as an attorney offering such witness testimony, you must lay the factual predicate with a degree of detail sufficient to lead to a rational conclusion.

Subsection (b) requires that the opinion or inference must be helpful to the jury and aid in the understanding of the witness's testimony. Thus, if the comment is just a side thought, it is not helpful and should not be allowed even if it meets the requirements in (a).

### Competence of Child Witness to Testify

Tex. R. Evid. 601 provides as a general rule every person is competent to be a witness. However, the rule provides that a child shall be incompetent to testify in a proceeding, if after being examined by the court, the child appears not to possess sufficient intellect to relate transactions with respect to which he or she is interrogated.<sup>97</sup>

The objecting party bears the burden of proof in showing the child is incompetent to testify. It is not necessary for the issue to be raised pre-trial. The court can raise the issue sua sponte. However, as the objecting party, your last chance to object is when the child is called to the stand. Failing to object at that time waives the right to do so.

Once the objection is made, normally the court or the lawyer will take the witness on voir dire to make a preliminary determination regarding the witness's competence to testify.<sup>98</sup> The examination can be made by either the lawyers or the court. Other evidence may be presented.<sup>99</sup> Rule 601 does not, however, empower the trial judge to compel a witness to undergo psychiatric testing to aid in determination of competence to testify.<sup>100</sup> The party calling the witness is not required to prove that the witness is competent to testify. However, if the child is of a very young age and the attorney has a feeling competency might be challenged, this rule permits the party offering the witness to conduct a competency hearing in advance to dispose of the issue before it is raised.

A witness is competent to testify if the witness possesses:

- 1) At the time the event occurred, competence to observe and perceive intelligently the events in question; and
- 2) At the time of trial, capacity to recollect the event and relate what happened.<sup>101</sup> The ability to relate encompasses "an ability to understand the questions asked and to frame intelligent answers" as well as "a moral responsibility to tell the truth."<sup>102</sup>

<sup>95</sup> Generally, this type of testimony is merely speculative. However, lay witnesses are permitted to give opinions or inferences if the testimony qualifies under Texas Rule of Evidence 701.

<sup>96</sup> Tex. R. Evid. 602.

<sup>97</sup> *Id.* at 601(a)(2).

<sup>98</sup> *Romines v. State*, 717 S.W.2d 745, 749 (Tex. App. – Fort Worth 1986, pet. ref'd) ("better practice" is to conduct preliminary inquiry into competency, but determination may instead be made from review of entire testimony); *Grayson v. State*, 786 S.W.2d 504, 505 (Tex. App. – Dallas 1990, no pet.) (Rule 601 does not require preliminary inquiry).

<sup>99</sup> *See Villarreal v. State*, 576 S.W.2d 51, 57 (Tex. Crim. App. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 176, 62 L.Ed.2d 114 (1979); *Beavers v. State*, 634 S.W.2d 893, 895 (Tex. App. – Houston [1st Dist.] 1982, pet. ref'd) (The court's decision as to the witnesses' competency may be based on voir dire examination of the prospective witness, or on the evidence of others).

<sup>100</sup> *Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995), cert. denied, 519 U.S. 826, 117 S.Ct. 87, 136 L.Ed.2d 44 (1996).

<sup>101</sup> *Reyna v. State*, 797 S.W.2d 189, 191–92 (Tex. App. – Corpus Christi 1990, no pet.) ("Three elements must be considered by the court in determining whether a witness is competent to testify: 1) the competence to observe intelligently the events in question at the time of their occurrence, 2) the capacity to recollect the events, and 3) the capacity to narrate them, which involves the ability to understand the questions asked and to frame intelligent answers, and the ability to understand the moral responsibility to tell the truth."); *Dufrene v. State*, 853 S.W.2d 86, 88–89 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd).

<sup>102</sup> *Watson v. State*, 596 S.W.2d 867, 870 (Tex. Crim. App. 1980); *Beavers v. State*, 634 S.W.2d 893, 895 (Tex. App. – Houston [1st Dist.] 1982, pet. ref'd).

Whether the witness is competent is a question for the trial court under Rule 104(a).<sup>103</sup> The court's determination should be reversed only for an abuse of discretion, after a review of the entire record.<sup>104</sup> There is no certain age below which a child is automatically disqualified to testify.<sup>105</sup> Courts frequently uphold the admissibility of testimony from children as young as three or four years of age.<sup>106</sup> Inconsistencies in the child's testimony, while probative on the issue of competency, do not alone render the child incompetent to testify.<sup>107</sup>

Once a child is deemed competent to testify, the child's testimony should be treated like that of any other witness. However, the objecting party can probe the witness on cross examination on inconsistencies in the testimony and competency issues. The jury is free to assign the appropriate weight to the testimony; they may accept or reject it. No special instruction to the jury regarding the child's credibility is necessary.<sup>108</sup>

The voir dire of the witness may occur in front of the jury or outside of the jury's presence.<sup>109</sup> If the examination occurs in front of the jury the questions should not be directed at the merits of the case. Additionally, if the examination occurs before the jury, make sure the judge does not make comments regarding the witness's competency that can be heard by the jury. If the judge makes a comment regarding his or her opinion on the witness's competency and the comment is heard by the jury, object to the judge's comment on the weight of the evidence.

**» PRACTICE TIP :** Whether a child appears competent to testify often depends on the skill of the attorney asking the questions, both during the competency inquiry and during substantive testimony. Counsel should develop expertise in asking clear, brief, concrete questions using age-appropriate language, and avoiding types of questions that children typically cannot answer, e.g. questions about exact dates, times, and sequence of events, questions about how often an event occurred, and questions using abstract concepts. (For example, "Do you know the difference between the truth and a lie?" is an abstract question many children cannot answer, but "If someone said this pencil is a dog, would that be the truth or a lie?" is much easier. The question "How many times did he hit you?" requires a child either to separately remember and count each incident, or use math to estimate, while "Did it happen once or more than once?" is easier.)

## Expert Witnesses

Texas Rule of Evidence 702 (Testimony by Experts) provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion

<sup>103</sup> Tex. R. Evid. 104(a) (Questions of Admissibility Generally).

<sup>104</sup> *Dufrene v. State*, 853 S.W.2d 86, 88 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd) ("This Court must review the **entire** testimony of the witness to determine if the trial court abused its discretion.") (emphasis in original).

<sup>105</sup> *Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973); *Upton v. State*, 894 S.W.2d 426, 429 (Tex. App. – Amarillo 1995, pet. ref'd).

<sup>106</sup> See e.g., *Fields v. State*, 500 S.W.2d 500 (Tex. Crim. App. 1973) (four-year-old); *Hollinger v. State*, 911 S.W.2d 35, 38–39 (Tex. App. – Tyler 1995, pet. ref'd) (four-year-old); *Dufrene v. State*, 853 S.W.2d 86, 88–89 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd) (four-year-old); *Kirchner v. State*, 739 S.W.2d 85, 88 (Tex. App. – San Antonio 1987, no pet.) (four-year-old); *Alexander v. State*, 692 S.W.2d 563, 566 (Tex. App. – Eastland 1985) (four-year-old), vacated on other grounds, 753 S.W.2d 401 (Tex. Crim. App. 1988); *Sanders v. State*, 727 S.W.2d 670, 672–73 (Tex. App. – Texarkana 1987) (three and a half year-old), vac'd on other grounds, 761 S.W.2d 6 (Tex. Crim. App. 1988); *Amescua v. State*, 723 S.W.2d 266, 268, 270–71 (Tex. App. – San Antonio 1986, no pet.) (three-year-old); *Romines v. State*, 717 S.W.2d 745, 748–49 (Tex. App. – Fort Worth 1986, pet. ref'd) (three-year-old); *Clark v. State*, 659 S.W.2d 53 (Tex. App. – Houston [14th Dist.] 1983, no pet.) (three-year-old).

<sup>107</sup> *Fields v. State*, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973) ("inconsistencies alone in a child's testimony would not render him an incompetent witness"); *Berotte v. State*, 992 S.W.2d 13, 17 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd) ("Confusing and inconsistent responses from a child are not reasons to determine she is incompetent to testify; rather, they speak to the credibility of her testimony").

<sup>108</sup> *Norman v. State*, 862 S.W.2d 621, 628 (Tex. App. – Tyler 1993, pet. ref'd) (rejecting claim that court should have instructed jury that child testimony in sexual abuse cases is "inherently questionable").

<sup>109</sup> *Reyna v. State*, 797 S.W.2d 189, 192 (Tex. App. – Corpus Christi 1990, no pet.) (There is no requirement that the hearing be held outside the jury's presence).

or otherwise.<sup>110</sup> Thus, for an expert's opinion to be admissible, the expert must be qualified on the specific issue before the court, and the expert's opinion must be relevant and based on a reliable foundation.<sup>111</sup>

The Texarkana Court of Appeals held that, in termination of parental rights cases, drug test results are not admissible unless the proponent presents information about the qualifications of the person or equipment used, the method of administering the test, and whether the test was a standard one for the particular substance.<sup>112</sup>

Often, the department will proffer a social worker witness as an expert witness, so that the witness can testify to things beyond his or her personal knowledge. The department will usually use a supervisor to fill this role as an expert witness because a supervisor is more likely to have the experience to meet the qualifications of an expert.

### Case law examples, offering social workers as experts:

Social worker was sufficiently qualified to conduct court-ordered home study and testify to her findings, where social worker held bachelor's degree in sociology and psychology, had extensive work experience in foster or substitute care industry, had received on-the-job training in conducting social studies, was certified by the department to conduct studies, and had conducted approximately 150 social studies.<sup>113</sup>

Clinical social worker who possesses two graduate degrees, is licensed to practice clinical psychology in two states, belongs to numerous professional societies and has been engaged in her profession for almost two decades has qualifications necessary for expert testimony.<sup>114</sup>

Admission of expert witness testimony that father had a propensity for sexual deviancy and that he posed a risk to his children, based on the expert's analysis of test data, was an abuse of discretion, in a termination of parental rights proceeding; proponent of expert evidence failed to establish how the formulas used to generate the test results were derived or whether they had ever been subject to analysis or testing, and they failed to offer evidence explaining concepts used by the expert to conclude that father was at risk of abusing his children.<sup>115</sup>

The trial court hearing a termination of parental rights case did not err by admitting the testimony of a certified social worker concerning his interpretation and conclusions of the results of penile plethysmograph test administered by a Ph.D. to the father; father did not object to prior introduction into evidence of Ph.D.'s report which discussed results of test, and witness held advanced degree in Science and Social Work and testified that he routinely used results of penile plethysmograph.<sup>116</sup>

A department investigator qualified to testify as expert with regard to whether child care facility was operating in violation of law, where investigator testified she had degree in sociology, was employed by DPRS for 20 years, was in child care licensing division for 10 years, and was a supervisor for 8 years.<sup>117</sup>

### Basis of Expert Testimony

Texas Rule of Evidence 703 provides the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.<sup>118</sup>

<sup>110</sup> Tex. R. Evid. 702.

<sup>111</sup> *Id.*

<sup>112</sup> *In re K.C.P.*, 142 S.W.3d 574, 578-585 (Tex. App. – Texarkana 2004, no pet.); *In re S.E.W.*, 168 S.W.3d 875, 882-885 (Tex. App. – Dallas 2005, no pet.) (expert testimony that parents' hair samples tested positive for cocaine was inadmissible because expert was not qualified to give opinion on results of laboratory testing and reliability of methods used was not established).

<sup>113</sup> *Taylor v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 641 (Tex. App.-Austin 2005, pet. denied).

<sup>114</sup> *Am. W. Airlines v. Tope*, 935 S.W.2d 908 (Tex. App. – El Paso 1996).

<sup>115</sup> *In re CDK*, 64 S.W.3d 679 (Tex. App.-Amarillo 2002).

<sup>116</sup> *In Interest of A.V.*, 849 S.W.2d 393 (Tex. App. – Fort Worth 1993).

<sup>117</sup> *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303 (Tex. App. – Houston [14th Dist] 2000, no pet.).

<sup>118</sup> Tex. R. Evid. 703.

In cross examining a witness, be sure to ask what facts he or she relies on in making the opinion. This is especially important when the expert is making an opinion on the ultimate issue in the case.<sup>119</sup> In making an opinion, the expert may be making the assumptions that certain disputed facts are true. For instance, if it is contested whether a father sexually abused the child, it is important to bring out the fact that the expert's opinion is based on that fact being true. To make this clear to the jury, ask for example, "So assuming the father did not sexually assault the child, you would not have the same opinion, correct?" As a point of advocacy, it is better to ask opposing experts closed ended questions so that they do not have an opportunity to explain and qualify their answer.

If an expert is relying on evidence that is otherwise inadmissible, that evidence should not be admitted into evidence unless the court determines that the probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial value. As the opposing party, object that the facts are inadmissible and are not the type reasonably relied on by experts in the field. Attack the admissibility of evidence by attacking the reliability of evidence (i.e., it is not reasonable to rely on the unreliable). So if a social worker expert witness bases his or her opinion on hearsay statements in the CPS record, the opponent can argue those statements that are otherwise inadmissible should not be admitted as hearsay is by its very nature unreliable. Additionally, you could offer your own expert to say relying on such information is not reasonable in the field.

The Texas Rules of Evidence provide that it is permissible for an expert to testify to an opinion on the ultimate issue.<sup>120</sup> However, the opinion must be otherwise admissible. A question cannot call for a legal conclusion; the opinion must be a question based on mixed law and fact and must be couched in the proper legal standard. This means the attorney offering the witness should ask the question using and explaining the proper legal terminology.

### **Qualifications and Reliability of Expert Testimony and Scientific Evidence**

An expert must be qualified by knowledge, skill, experience, training, or education, and his testimony must assist the trier of fact in understanding the evidence or determining a fact in issue.<sup>121</sup> This rule not only applies to scientific and technical matters in their traditional sense, but applies equally to witnesses with specialized knowledge or experience and allows them to determine ultimate issues of fact.<sup>122</sup>

The difference between scientific and nonscientific expert testimony is that the former is based on the application of scientific principles which can be readily tested by the *Daubert/Robertson* factors on reliability of expert testimony.<sup>123</sup> It was once thought that *Daubert* applied only to hard "science," but cases have held that the test applies to all fields, but the same factors do not apply to every field.<sup>124</sup>

In determining whether expert opinion testimony is reliable, courts may consider several factors: (1) the extent to which the theory underlying the expert's testimony has been tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonvalid judicial uses which have been made of the theory.<sup>125</sup>

A court can take judicial notice of scientific theories that have been proven and readily accepted by courts.<sup>126</sup> If the court takes judicial notice of wide acceptance of the scientific principles, it is not necessary to lay the *Daubert* reliability predicate for the method. However, an expert must still testify to his opinions in the case using the scientific principles. The judicial notice should not take the place of expert testimony in its entirety, but only in regards to the reliability of the scientific method. A court cannot take judicial notice of the expert testimony of a witness in a companion case.<sup>127</sup>

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<sup>119</sup> Expert opinions on the ultimate issue are permissible. Tex. R. Evid. 704.

<sup>120</sup> *Id.*

<sup>121</sup> In re D.S., 19 S.W.3d 525 (Tex. App. – Fort Worth 2000).

<sup>122</sup> *Id.*

<sup>123</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>124</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

<sup>125</sup> See *Daubert*, 509 U.S. 579 (1993).

<sup>126</sup> *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

<sup>127</sup> In re J.L., 163 S.W.3d 79 (Tex. 2005).



To determine the reliability of nonscientific expert opinion evidence, courts must analyze the underlying data forming the basis for the expert's opinion, and determine whether there is an analytical gap between the opinion and the basis on which it is founded.<sup>128</sup> As the offering attorney, you must prove what factors are to be considered for reliability in that particular field. The court will apply a test similar to *Daubert* but the factors will be modified to fit the particular field.

Cases have held “play therapy” is a legitimate field of expertise and a licensed professional counselor, especially with play therapy education and training, is properly qualified as an expert witness regarding therapy sessions with the child, and is admissible under *Daubert*.<sup>129</sup>

Nonscientific opinion testimony by an expert witness that a child's burns were consistent with abuse, not accident, based on the fact that burns were evenly distributed over the body, which suggested child was held down in hot water, was sufficiently reliable to warrant admission in a proceeding to terminate parental rights because the expert based his opinion on objective criteria used by physicians to determine the cause and nature of burns, and the expert had 25 years experience treating patients with burns.<sup>130</sup>

For more information on the admissibility of scientific evidence in a family law case, refer to *Family Law Litigation Guide with Forms* § 21.06.<sup>131</sup>

### The Rule — Excluding or Sequestering Witnesses

Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 614, more commonly known as “the rule,” allows for excluding witnesses from the courtroom during the receipt of evidence so that their testimony will not be affected consciously or involuntarily by knowledge of other witnesses' testimony.<sup>132</sup> In order for the rule to apply, a party to the case must “invoke the rule” by making a request to the court.<sup>133</sup> Once the request is made, the court shall order the witnesses excluded so that they cannot hear the testimony of other witnesses. The witnesses on both sides are sworn and removed from the courtroom to a location where they can not hear the testimony, as delivered by any other witness in the case.<sup>134</sup> If neither party invokes the Rule, the trial court is not to give instructions pursuant to it and any testimony that follows an alleged breach of the Rule need not be struck.<sup>135</sup> The purpose of invoking the rule is to aid in the ascertainment of truth by preventing the testimony of one witness from influencing the testimony of another.<sup>136</sup> Sequestration minimizes witnesses' tailoring of their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side.<sup>137</sup>

The rule can be invoked at any time during trial, but practically speaking, it is most effective to invoke the rule prior to testimony. Most commonly, the rule is invoked by either party before opening statements or the beginning of testimony. However, a party does not waive the right to invoke simply by letting the witnesses hear some testimony.

If the Rule is not specifically noted in the record, it can not be invoked on an uncorroborated recollection of what transpired at trial.<sup>138</sup>

Prior to 1988, the Rule was considered directory and not mandatory; its administration rested in the sound discretion of the trial judge to be reviewed only on a showing of abuse of discretion.<sup>139</sup> However, under the current

<sup>128</sup> *In re D.S.*, 19 S.W.3d 525 (Tex. App. – Fort Worth 2000).

<sup>129</sup> *In re A.J.L.*, 136 S.W.3d 293 (Tex. App. – Fort Worth 2004).

<sup>130</sup> *Id.*

<sup>131</sup> 2 Don Peters, *Family Law Litigation Guide with Forms* § 21.06 (2007).

<sup>132</sup> Tex. R. Civ. P. 267.

<sup>133</sup> *Id.* at (a).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at (d).

<sup>136</sup> *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 588 (Tex. App. – Eastland 1990, writ denied) (child was brought into courtroom after foster mother's testimony; therefore, child could not have been influenced by testimony of foster mother; thus, violation of rule did not affect its purpose).

<sup>137</sup> *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 116 (Tex. 1999).

<sup>138</sup> *Pierson v. Noon*, 814 S.W.2d 506, 508–09 (Tex. App. – Houston [14th Dist.] 1991, writ denied) (doctor/witness, who testified after meeting with attorneys of record and doctor, also designated as fact and expert witness, was allowed to testify because no showing that Rule had been invoked).

<sup>139</sup> See *Triton Oil & Gas Corp. v. E. W. Moran Drilling Co.*, 509 S.W.2d 678, 684 (Tex. Civ. App. – Fort Worth 1974, writ ref'd n.r.e.) (rule discretionary, not mandatory); *Tex. Roofing Co. v. Whiteside*, 385 S.W.2d 699, 702 (Tex. Civ. App. – Amarillo 1964, writ ref'd n.r.e.) (no abuse of discretion for court to refuse to invoke Rule); *Medrano v. City of El Paso*, 231 S.W.2d 514, 517 (Tex. Civ. App. – El Paso 1950, writ ref'd n.r.e.) (provision was directory not mandatory and failure to invoke Rule should not be reviewed unless abuse of discretion was shown).



rule, upon request by either party invocation by the court is mandatory rather than discretionary.<sup>140</sup> Therefore, invocation of the rule is not at the discretion of the judge once requested. However, the enforcement of the Rule is within the discretion of the trial court.

After a request has been made, the judge will ask all witnesses in the courtroom to come forward, take an oath, and they are instructed that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and they are not to read any report of or comment upon the testimony in the case while under the rule.<sup>141</sup> The witnesses are removed out of the courtroom to some place where they cannot hear the testimony in the case.<sup>142</sup>

Often, not all of the witnesses for the case will be present in the court room when the rule is invoked. Even if a witness is not physically present, the rule automatically applies regardless of whether the witness has been sworn and instructed by the judge. The obligation is on the lawyer to make sure his witnesses do not violate the rule. So as an attorney you must train yourself to always glance over at the door when you hear it open to make sure one of your witnesses is not stepping in. If a witness listens to testimony of another witness, that witness may not be allowed to testify.

There are several exemptions to the rule, regarding certain witnesses permitted to remain in the courtroom. The Rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such a natural person, or (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential in the presentation of the cause.<sup>143</sup>

Because the department is not a natural party, the department fits under (2), allowing one representative of the department to stay in the courtroom and not be excluded by the rule.<sup>144</sup> Thus, all other witnesses on behalf of the department must be excluded.

Expert witnesses are not exempt from the rule unless their presence is shown to be essential.<sup>145</sup> Many times the presence of an expert witness is essential because the expert needs to be present for the testimony of other witnesses so that the expert can testify that his or her opinion is based on the facts presented at trial. Additionally, the presence of the expert is important so the expert can meaningfully respond to the expert testimony presented by the other party.

**» NOTE :** The department may designate a CPS employee as an expert witness so that the witness can testify to opinions and facts that he or she does not have personal knowledge of. It is permissible for the department to do this, so long as the witness qualifies as an expert based on knowledge, training, skill, education, or experience.<sup>146</sup> However, if the department does this, most likely the judge will not allow that expert witness, in addition to the representative, to stay in the court room as someone whose presence is essential. Point out to the judge that the department could easily name that expert witness as the representative, and by not doing so they are trying to undermine the purpose of the rule to have two of their employees present in the court room.

Because children are not technically parties to the case, if they are a witness in the case they will be subject to the rule and not permitted to stay in the courtroom for other testimony.<sup>147</sup> The child's attorney, however, has the

<sup>140</sup> Tex. R. Civ. P. 267(a).

<sup>141</sup> Tex. R. Civ. P. 267(d).

<sup>142</sup> *Id.* at (d).

<sup>143</sup> *Id.* at (b); *see also* Tex. R. Evid. 614.

<sup>144</sup> Tex. R. Civ. P. 267(b)(2).

<sup>145</sup> *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999) (expert witnesses are subject to the rule, unless specifically exempted by the court.).

<sup>146</sup> Tex. R. Evid. 702.

<sup>147</sup> *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 588 (Tex. App. – Eastland 1990, writ denied).

ability to invoke the rule. The Family Code provides that the child's attorney should participate in the conduct of the litigation to the same extent as an attorney for a party.<sup>148</sup>

If the rule is violated, the witness who violated the rule might be prohibited from testifying completely or prohibited from going into the matters on which he heard another witness testify in violation of the rule.

## Documentary Evidence

### Records of Child Abuse Investigation

Generally, information relating to the investigation of child abuse may not be disclosed unless court orders it disclosed after determining that disclosure is essential to the administration of justice and would not endanger the child, the person reporting the abuse, or any other person.<sup>149</sup> This provision applies to records maintained by Court Appointed Special Advocate (CASA) and the Children's Advocacy Center (CAC). In a termination of parental rights case initiated by DFPS, for example, CASA and CAC records concerning reports of child abuse were held to be confidential and not subject to the grandparents' discovery requests because they did not show either that disclosure was essential to the administration of justice, or that disclosure posed no danger to the children or another person.<sup>150</sup> The standard for release of records, in addition to persons who may obtain records, are codified in Texas Family Code § 261.201.

The department should not be able to get the entire CPS file into the record with judicial notice. If the department attempts to have the judge take judicial notice of the record, one should object that the record does not reflect undisputed facts, as is required for the taking of judicial notice.<sup>151</sup>

### Use of Prior Orders as Evidence

If a previous order contains findings of fact, admitting the unredacted order into evidence at a final termination of parental rights hearing may run afoul of the rule prohibiting a presiding judge from testifying at trial as a witness.<sup>152</sup> Additionally, Texas law prohibits judges from commenting on the weight of the evidence, including comments that indicate the judge's opinion as to the verity or accuracy of the facts at issue. If an order including findings of fact is admitted into evidence, and those facts are the same factual findings the jury is asked to find, the order may be perceived to indicate the court's opinion on the issue.

For instance, in one case the trial court admitted temporary orders and an order based on a permanency hearing in support of the state's position that the mother failed to comply with court orders. The Texas Supreme Court held that admission of the orders was not in itself inappropriate, but the trial judge's factual findings that the order was violated should have been redacted, so that the jury could draw its own conclusions as to whether the mother had complied.<sup>153</sup>

The prior denial of a petition for termination of parental rights is not a complete bar to subsequent termination proceedings brought by DFPS. Pursuant to Texas Family Code §161.004, at a hearing falling under this section, the court may consider evidence presented at a previous hearing in a suit for termination of the parent-child relationship of the parent with respect to the same child.<sup>154</sup> The court may terminate the parental rights after rendition of a prior order denying termination of the parent-child relationship if: (1) the petition under this section is filed after the date the order denying termination was rendered; (2) the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered; (3) the parent committed an act listed under Texas Family Code §161.001 before the date the order denying termination was rendered; and (4) termination is in the best interest of the child.<sup>155</sup>

<sup>148</sup> Tex. Fam. Code § 107.003(1)(F).

<sup>149</sup> *Id.* §261.201.

<sup>150</sup> *In re Fulgium*, 150 S.W.3d 252, 254-256 (Tex. App. – Texarkana 2004).

<sup>151</sup> Tex. R. Evid. 201.

<sup>152</sup> *Id.* at 605.

<sup>153</sup> *In re M.S.*, 115 S.W.3d 534, 536-538 (Tex. 2003) (any error was harmless because record contained ample evidence that mother had violated court's orders).

<sup>154</sup> Prior to the enactment of this statute in 1995, the prior denial was a bar to the admission of evidence of the conduct of the parents occurring prior to the order denying termination based on the doctrine of res judicata. See *Slatton v. Brazoria County Protective Servs. Unit*, 804 S.W.2d 550 (Tex. App. – Texarkana 1991).

<sup>155</sup> Tex. Fam. Code §161.004.



## Discovery

### Discovery Control Plan Orders

Unlike most civil or criminal suits, suits for protection of children by the Department must be filed almost immediately on discovery of a child in danger. The process is accelerated, and the investigation often continues during the early stages of the case. Furthermore, the mandated series of hearings, in which fact-gathering on all sides continue and the one-year deadline for trial make standard discovery difficult for all parties. The normal discovery process is, therefore, a poor fit for the system as set out in the Family Code and in practice throughout the state.

The Texas Rules of Civil Procedure require that every case be governed by a discovery control plan.<sup>1</sup> In the absence of an order specifying how discovery is to be conducted, suits “under the Family Code,” are governed by Level 2 requirements, with a discovery period beginning when the suit is filed and continuing until thirty days before the date set for trial.<sup>2</sup> A Level 2 discovery control plan provides 50 hours of deposition time for each side, and allows each party to “serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents;” it provides no restrictions on Requests for Disclosure, Requests for Production, Requests for Admissions, or other discovery techniques provided by the Rules of Civil Procedure. The most problematic part of the rule, however, is the provision that discovery may be initiated immediately on filing of the suit. As noted above, the Department is required to file suit in most cases before all facts have been gathered; petitions are pled broadly and in the alternative for just this reason. The system is set up to encourage family services and most cases result in reunification, so discovery may ask for information that is simply not yet available, and the costs and disruption from normal case work of formal discovery is simply not necessary in many cases. A discovery control plan by order (Level 3) allows the trial court to encourage cooperative sharing of information and allow full preparation of all sides for trial without the confusion and expense of proceeding without such guidelines.

In an Explanatory Statement accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery, the Supreme Court observed that “[r]ecent years’ experience has shown that discovery may be misused to deny justice to parties by driving up the costs of litigation until it is unaffordable and stalling resolution of cases. As any litigant on a budget knows, the benefits to be gained by discovery in a particular case must be weighed against its costs. ... The rules of procedure must provide both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism.” These comments “are intended to inform [the rules’] construction and application by both courts and practitioners.” These principles are consistent with the very first rule of civil procedure, stating the Objective of [The] Rules: “The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the State as may be practicable, these rules shall be given a liberal construction.”<sup>3</sup> To carry

<sup>1</sup> Tex. R. Civ. P. 190.1.

<sup>2</sup> *Id.* at 190.1(b)(1)(A).

<sup>3</sup> *Id.* at 1.

out the purposes of the rules, a trial court is given the authority “on its own initiative, [to] order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit.”<sup>4</sup>

“The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166 [Pre-trial Conference], and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include: (1) a date for trial or for a conference to determine a trial setting; (2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it; (3) appropriate limits on the amount of discovery; and (4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses.”<sup>5</sup>

These provisions mean what they say. The trial court has broad discretion under the discovery rules adopted in 1999. “The new discovery rules explicitly encourage trial courts to limit discovery when ‘the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.’”<sup>6</sup> A court can abuse its discretion by acting unreasonably, and the burden is on a party resisting discovery to show that the discovery is unduly burdensome or unnecessarily harassing.<sup>7</sup>

A discovery control plan order can be an important tool in the orderly processing of a protective services case. Many jurisdictions have adopted standard orders, which may be tailored to the circumstances of the particular case. All lawyers must become familiar with local practice with respect to the required discovery control plan, whether or not orders are routinely used.

**» PRACTICE TIP :** It is very important to examine the discovery control plan used in your jurisdiction in order to ascertain the timelines applicable to your case. In some jurisdictions, the response dates for requests for information and/or documents may be tied to the trial date. For example, the response may be due 30 days prior to the trial date rather than 30 days from the date of the request.

## Requests for Disclosure

A party may obtain disclosure from another party no later than 30 days before the end of the applicable discovery period.<sup>8</sup> A party may request disclosure of any of the information listed in Rule 194.2.<sup>9</sup> Requests for disclosure are designed to provide simple and inexpensive discovery without the hindrance or delay of objections.<sup>10</sup> However, as Comment 1 to Rule 194 acknowledges, an assertion of privilege may be appropriate in extremely rare cases when information ordinarily discoverable should be protected, such as when revealing a person's residence might result in harm to the person.<sup>11</sup> In such situations, a party may assert any applicable privileges other than work product using the procedures of Rule 193.3 or seek a protective order pursuant to Rule 192.6.<sup>12</sup> Except for these rare cases, a failure to fully respond to requests for disclosure would be an abuse of the discovery process sanctionable under Rule 215.3.<sup>13</sup>

<sup>4</sup> Tex. R. Civ. P. 190.4(a).

<sup>5</sup> *Id.* at 190.4(b).

<sup>6</sup> *In re Alford Chevrolet-Geo*, 997 SW2d 173, 181 (Tex. 1999); Tex. R. Civ. P. 192.4(b).

<sup>7</sup> *Id.*

<sup>8</sup> Tex. R. Civ. P. 194.1.

<sup>9</sup> *Id.* at 194.2.

<sup>10</sup> 47 Tex. Prac., Discovery Practice § 8:4 (2008 ed.).

<sup>11</sup> Tex. R. Civ. P. 194, cmt. 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Rule 194.2 sets for the matters on which a party may request disclosure from another party:

- a) the correct names of the parties to the lawsuit;
- b) the name, address, and telephone number of any potential parties;
- c) the legal theories and, in general, the essential bases of the responding party's claims or defenses (without marshaling all evidence that may be offered at trial);
- d) the amount and any method of calculating economic damages claimed;
- e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- f) for any testifying expert:
  - 1) the expert's name, address, and telephone number;
  - 2) the subject matter on which the expert will testify;
  - 3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or documents reflecting such information if the expert is not retained by, employed by, or otherwise in the control of the responding party;
  - 4) if the expert is retained by, employed by, or otherwise in the control of the responding party:
    - A. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
    - B. the expert's current resume and bibliography;
- g) any discoverable indemnity and insuring agreements;
- h) any discoverable settlement agreements;
- i) any discoverable witness statements;
- j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
- k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by virtue of an authorization furnished by the requesting party; and
- l) The name, address, and telephone number of any person who may be designated as a responsible third party.<sup>14</sup>

### Request for Production

It may be necessary to make a request for production pursuant to Rule 176 to receive the case record from the Department. Sometimes, the Department will produce a de-identified version of the case record upon the written request of an attorney.

<sup>14</sup> *Id.* at 194.2.



A request for production of documents must:

- Sufficiently describe the item or category of items requested;
- Be served at least 30 days before the end of the discovery period; and
- Specify a reasonable time and place for the response.<sup>15</sup>

If the request seeks medical or mental health records from a non-party, the request must be served on a nonparty in compliance with Rule 21a, with limited exceptions.<sup>16</sup>

The responding party:

- May produce copies in lieu of originals (unless the issue of authenticity is raised);
- May retain originals and permit access for inspection and copying; and
- Must produce documents as they are maintained in the usual course of business or organized to correspond to categories in the request.<sup>17</sup>

### Expert Witnesses

Unless otherwise ordered by the court, a party must designate experts (furnishing all information requested under a request for disclosure)<sup>18</sup> by the later of 30 days after the request is served, or

- (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
- (b) with regard to all other experts, 60 days before the end of the discovery period.

Upon proper objection, the failure to timely list a witness, including an expert witness, in response to a discovery request, will result in the witness not being allowed to testify, unless good cause is shown.<sup>19</sup> The request for disclosure also requires productions of writings made by or relied upon by the expert in making his or her opinion.

However, it has been held that where the department is unaware of the existence of notes made by a private licensed professional counselor, who testified from detailed notes of sessions with the mother and children, the court is not required to strike a counselor's testimony as a discovery sanction in a termination proceeding.<sup>20</sup>

## The Trial

### Read What's Been Given to You

It's very important for all counsel to read the case record, witness lists, and any other documents provided pursuant to statute or in response to informal or formal discovery requests. In addition to the Department's case record, there may be business records filed before trial in accordance with Texas Rule of Civil Evidence 901(10), which allows for records to be authenticated as business records if an accompanying business records affidavit is filed 14 days before trial. It is not unusual for the Department's case record to be incomplete, so relying solely on it to prepare for your case may be very detrimental to your client.

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<sup>15</sup> Tex. R. Civ. P. 196.1.

<sup>16</sup> Tex. R. Civ. P. 196.1 (c).

<sup>17</sup> Tex. R. Civ. P. 196.39(c).

<sup>18</sup> See *id.* at 194.2(f).

<sup>19</sup> *In Interest of A.V.*, 849 S.W.2d 393 (Tex. App. – Fort Worth 1993).

<sup>20</sup> *In Interest of R.V., Jr.*, 977 S.W.2d 777 (Tex. App. – Fort Worth 1998).

**» PRACTICE TIP :** Counsel should conduct its own independent investigation. Read the agency and police reports, social worker's notes, and medical records. It's important to do this to assess and formulate a position on the strength of the agency's evidence supporting each allegation, and to independently determine whether a sufficient nexus exists between the alleged behavior of the parent and risk to the child. Each appointed counsel, including the attorney ad litem for the child, has a duty to independently investigate the facts and circumstances of the case, and should not rely solely on documents, interviews or other evidence produced by the Department or opposing counsel.

Counsel should also interview potential witnesses and verify statements they have already provided to others. In reviewing notes of interviews with parties and/or witnesses, try to determine if the information is verbatim or paraphrased, whether the witness was interviewed in person or over the phone, individually or in a group with others (this is especially important with children, who are greatly influenced by the statements of others). In some cases, you will want to contact the person to verify the information provided.

In addition to reviewing the documents that have been provided, explore additional sources of information, such as hospitals and doctor's office records, clinic records, school personnel and school records, relatives, and mental health agencies that may have been involved with the family prior to the case filing.

### **Review Your Own File**

Examine the documents that you have collected throughout the pendency of the case, including CPS and CASA court reports and the pleadings. What a court ultimately allows in a jury charge will depend on the evidence and what the pleadings support.

**» PRACTICE TIP :** It is essential that all the evidence counsel needs to present their case has been collected, documented, evaluated and verified, if possible. For example, in a case with medical issues, counsel should consider consulting with and retaining an expert to assist in understanding the issues and in presenting counsel's case to the fact finder. Similarly, where witness statements have been made part of the case, counsel should attempt to verify those statements and consider issuing subpoenas for those witnesses so their live testimony can be part of the case.

If you are going to call witnesses, make sure they have been interviewed and are prepared to testify. Never call a witness that hasn't been personally spoken to by counsel in advance of their testimony. In preparing witnesses, advise them of likely direct and cross examination questions, counsel them to tell the truth, and to not volunteer information.

Exchange witness lists with opposing counsel.

If you have documents you plan to introduce, make sure you have provided complete copies to all counsel in advance, unmarked, and have the originals for the court.

**Know the applicable rules of evidence. The three main bases for objecting to evidence in a child protection case are hearsay, foundation and relevance. Be prepared to object to witnesses or testimony that is irrelevant, without foundation or calls for hearsay answers. Be prepared to meet objections to your evidence on those same grounds. There are additional objections to evidence, but those are the Big Three.**

**File motions in limine and/or trial and evidentiary briefs as required.**

### **Develop a Theme and Theory for Your Case**

Judges who hear CPS cases may have “heard it all before.” They don’t want to “waste time” with witnesses and evidence. But every case, like every child and every family, is different, and deserves to be looked at in fresh perspective. Focus on the issues and areas that make your case different from the case heard before it and after it. Give the judge a reason to “do the right thing.”

As you consider your evidence, witnesses and additional investigation, consider how each part fits into the theory of your case. Develop questions for witnesses that either help forward your position, or hinder opposing counsel’s progress. **Know where you want to go with your case and plot your tactics to align with that strategy.**

### **Know Your Local Rules**

Read your local rules. Some counties impose additional burdens on lawyers to file and serve a witness/expert/exhibit list and motion in limine within very strict timeframes. Some judges will not allow a witness to be called that is not listed on the local rule witness list, even if that person is listed in a response to discovery.

### **Read the Law and Prepare Your Defense**

Determine what pleadings the Department or other parties plan to move forward on. Who are you aligned with? What is the evidence for each ground of termination or other relief the Department is seeking? What is the evidence regarding best interest? Who are the witnesses? Assume that the Department’s attorney will call the parents and the caseworker(s) and may call CASA.

What is your defense? How are you going to show it?

**» PRACTICE TIP :** It is imperative that counsel be aware of the applicable burdens of proof at each stage of the proceedings, and the rules regarding admission of certain types of evidence. If opposing counsel is attempting to introduce evidence that is objectionable, counsel must object to the admission of the evidence on the record to preserve the issue for appeal.

### **Jury Selection**

Jury selection is an important part of any case, but it is especially crucial in a CPS case that is by its very nature very emotional. The scope of this manual does not cover the basics of voir dire, so the attorney should review the applicable rules and case law prior to trial.

As you form your theory of the case, think about the type of juror best suited for the case.

The Texas Office of Court Administration develops a basic juror information card that each potential juror is required to complete. Texas Government Code § 62.0132 requires that the card contain basic information, including the person’s:

- 1) name, sex, race, and age;
- 2) residence address and mailing address;
- 3) education level, occupation, and place of employment;
- 4) marital status and the name, occupation, and place of employment of the person's spouse;  
and
- 5) citizenship status and county of residence.

Below is a sample of the form developed by OCA.<sup>21</sup>

**THE FOLLOWING “JUROR QUESTIONNAIRE” IS MANDATED BY GOVERNMENT CODE, SECTION 62.0132.**

*Your answers are CONFIDENTIAL and may be disclosed only to the judge, court personnel, the litigant, and the litigant's attorney.*

PLEASE TYPE OR PRINT WITH INK ONLY					JUROR QUESTIONNAIRE	
<input type="checkbox"/> Male <input type="checkbox"/> Female	Race (required by State Law):		Age:	Date of Birth:	Are you a U.S. Citizen? <input type="checkbox"/> Y <input type="checkbox"/> N	
Your Name: Home Address:					<b>Please check highest level of education completed:</b> <input type="checkbox"/> No H.S. Diploma or GED <input type="checkbox"/> GED <input type="checkbox"/> H.S. Diploma <input type="checkbox"/> 2yr College <input type="checkbox"/> 4yr College/University <input type="checkbox"/> Post-Graduate <input type="checkbox"/> Other _____	
Mailing Address (if different from home):						
Primary Phone:	Alternate Phone:	County of Residence:				
Your Occupation:						
Your Employer:			How Long?		<b>Current Marital Status:</b> <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced	
Spouse's Name:		Spouse's Occupation:				
Spouse's Employer:		How Long?				
Have you ever served on a civil jury? <input type="checkbox"/> Y <input type="checkbox"/> N			Have you ever served on a criminal jury? <input type="checkbox"/> Y <input type="checkbox"/> N		Number of Children: _____	
<b>I CERTIFY THAT ALL ANSWERS ARE TRUE AND CORRECT.</b> Please sign here: _____					Ranges of Age: from ____ years to ____ years	

Each county can develop their own questionnaire so long as it contains at least the information required by OCA. Most counties use a form that is more expansive.

The attorneys will receive these cards prior to voir dire. Upon receiving the cards, study them and try to determine who would likely be in your favor. This initial impression may be incorrect, but it gives you a starting point to begin questioning panel members on potential conflicts.

When you receive the cards, order them by the number assigned to each panel member. Look at the first half of card and the second half of cards. If the first half contains more people that you feel might be against you, request a jury shuffle. If the county is an interchangeable county, the judge is required to shuffle upon request.<sup>22</sup> However, the jury can only be shuffled once. The shuffle must be requested before voir dire begins.

Use the cards to pinpoint potential biases or prejudices a person may have because of their background. For instance, if a potential juror, or the individual's spouse, is a caseworker for CPS, counsel for the parent might want to challenge that panel member. Additionally, persons that have children may see your case differently than persons that do not.

The attorney should never rely on these initial impressions alone. This type of assessment provides only a stereotype, so it should be stressed that the attorney be attentive to responses given during voir dire questioning.

<sup>21</sup> Available at [http://www.courts.state.tx.us/pubs/mjs\\_sep07.pdf](http://www.courts.state.tx.us/pubs/mjs_sep07.pdf)

<sup>22</sup> Tex. R. Civ. P. 223.

While you are questioning jurors about potential conflicts and biases, be careful about discharging a panelist based on race or gender. If you feel another attorney is striking panelists simply because of race, you can make a Batson challenge to get them to show that they struck a potential juror for some reason other than race.

Finally, enlist another lawyer or colleague to watch the jury as you and the attorneys conduct voir dire. You may be so busy focusing on the questions that you miss important cues and/or body language exhibited by a potential juror who may be supportive of another party to the suit or opposed to your client.

# Jurisdictional Issues and Special Considerations: Local, National and International

## Considering the term “jurisdiction.”

The term “jurisdiction” means different things in different contexts. The “judicial power” of Texas is specifically vested in named courts, including District Courts by the Texas Constitution,<sup>1</sup> which provides that “District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.”<sup>2</sup> Although the Texas Legislature has designated some District Courts as specialized family courts, they all retain the general jurisdiction conferred by the Constitution. It should be kept in mind that these Constitutional powers extend beyond the bounds of the Family Code; thus, the question should not be “what gives the District Court jurisdiction to do this?” but “what restricts the court’s jurisdiction?” On the other hand, County Courts at Law given family law jurisdiction are limited to the “prescribed jurisdiction” granted by the legislature.

The case law and legislation discussed here should be viewed in the light of the general principle that the “judicial power” extends to all cases, controversies, persons and governmental entities before the court or within reach of the court’s writ power, subject to restrictions on the *exercise* of that power imposed either by the courts themselves, by the state or federal constitutions, or by statute.

## Subject matter jurisdiction.

Subject matter jurisdiction is the power of a court to decide a particular *type* of case. For example, a statutory county court judge would have lacked subject matter jurisdiction of a suit challenging a fee, but since a statute provided that under the circumstances he was “sitting as a district court judge” in the case, he had subject matter jurisdiction.<sup>3</sup> When the Family Code refers to a court with “jurisdiction to hear” a CPS suit “in the county in which the child is found,”<sup>4</sup> it is referring to the *subject matter jurisdiction* of the district court (or statutorily-empowered statutory county court) to hear family law cases, not to the question of whether a court should *exercise* its family law jurisdiction over a particular child or party. A Justice of the Peace, for example, never has family law jurisdiction, and no set of facts will permit a JP to determine custody or grant a divorce. Unfortunately, many appellate opinions use the term “subject matter jurisdiction” when discussing the restrictions on jurisdiction imposed by statutes intended to resolve jurisdictional conflicts within or between states.

As the United States Supreme Court observed in 1947, “[c]onflicts arising out of family relations raise problems and involve considerations very different from controversies to which [other litigation] give[s] rise,” courts should take care that the use of “the same legal words and phrases” in the context of family law “not to obliterate the great difference between the interests affected by” family law and the interests affected by disputes over property.<sup>5</sup>

<sup>1</sup> The Legislature is given the power to “establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.” Tex. Const., Art. 5, sec. 1.

<sup>2</sup> Tex. Const., Art. 5, sec. 8; Tex. Gov’t. Code §24.007.

<sup>3</sup> *Camacho v. Samaniego*, 831 S.W.2d 804, 805 (Tex. 1992).

<sup>4</sup> Tex. Fam. Code § 262.002.

<sup>5</sup> *Haley v. Haley*, 330 U.S. 610, 616 (1947) (Frankfurter, J., concurring).



***In personam* jurisdiction.**

In order to render a judgment enforceable against the *person* of the defendant, a court must have jurisdiction over that person. For example, in order to impose a child support obligation on a parent, the court must, as a matter of federal constitutional law, have jurisdiction over the person of the defendant.<sup>6</sup> A court may exercise personal jurisdiction over a respondent who is a resident or domiciliary of Texas with proper service anywhere in the state or beyond; if the person is not a resident or domiciliary, the court may exercise personal jurisdiction if (1) the person is personally served with citation in this state; (2) the person submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction; (3) the child resides in this state as a result of the acts or directives of the person; (4) the person resided with the child in this state; (5) the person resided in this state and provided prenatal expenses or support for the child; (6) the person engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; (7) the person, as provided by Chapter 160: (A) registered with the paternity registry maintained by the bureau of vital statistics; or (B) signed an acknowledgment of paternity of a child born in this state; or (8) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.<sup>7</sup> If there is a prior child support order in another state or another country that needs to be modified, the requirements of Chapter 159, the Uniform Interstate Family Support Act (UIFSA) must be met even if personal jurisdiction over the defendant is obtained.<sup>8</sup>

***In rem* or *status* jurisdiction.**

If the subject matter or the suit is before the court and the defendant has been notified, or constructively notified, of the suit the court may be able to render an enforceable judgment without personal jurisdiction over the defendant. For example, the court may adjudicate title to property in Texas as part of a divorce, rule on the *marital status* of the parties by granting dissolution, and determine *custody* of the children. However, the same court may not have jurisdiction to render a child support order unless long-arm facts are established or the defendant waives the issue of personal jurisdiction.<sup>9</sup> The court may adjudicate the *status* of the parent-child relationship — i.e. terminate parental rights — if the status jurisdiction requirements of Chapter 152, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) are met without obtaining personal jurisdiction over the parent.<sup>10</sup>

The exercise of status jurisdiction over child custody litigation has a long history in Texas.<sup>11</sup> Status jurisdiction with respect to children is, if anything, more expansive than with respect to real or personal property. As the Dallas Court of Appeals observed in the 1980 *Perry v. Ponder* case, a “child’s future cannot be left hanging in limbo in order to satisfy a [jurisdictional] theory developed in the context of money judgments.”<sup>12</sup> With a child, “some court *must* have jurisdiction to make a decision;”<sup>13</sup> “the inability of any state to make a binding adjudication” poses a greater threat to children’s welfare than “[t]he potential for conflicts between competing jurisdictions” because it “encourage[s] the parties to resort to self help, disregarding the children’s welfare.”<sup>14</sup>

**Exercise of partial jurisdiction.**

The Family Code specifically provides that a court may exercise jurisdiction over those parts of the suit for which it has authority and dismiss other issues.<sup>15</sup> In other words, the court may determine conservatorship or terminate parental rights even if it lacks authority to establish or modify the support obligation of the defendant. Of course termination of parental rights may make the support obligation unenforceable, at least prospectively;

6 *Kulko v. Superior Court of California*, 436 U.S. 84 (1978).

7 Tex. Fam. Code § 102.011(b).

8 Tex. Fam. Code § 159.201(b).

9 *In re S.A.V. and K.E.V.*, 837 S.W.2d 80 (Tex. 1992).

10 *Arteaga v. TDPBS*, 924 S.W. 2d 756 (Tex. App. – Austin 1996, writ denied) (Under Tex. Fam. Code § 152.205 court has jurisdiction to terminate parental rights of Mexican nationals where Texas was child’s home state).

11 *Peacock v. Bradshaw*, 194 S.W.2d 551, 555 (Tex. 1946); *Perry v. Ponder*, 604 S.W.2d 306, 315 (Tex. Civ. App. – Dallas 1980, no writ) (“custody litigation necessarily involves third persons, namely the children, whose interests should be paramount. Consequently, there is equal or greater reason for a court to determine a relationship affecting children residing within its borders without requiring personal service of process within the state. . . . For these reasons, custody of children has been recognized traditionally as a status which may be determined at the domicile of the child.”); LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 3:3 (2006); James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 693 (2005);

12 *Perry*, 604 S.W.2d at 316.

13 *Id.* (emphasis added).

14 *Perry*, 604 S.W.2d at 318.

15 Tex. Fam. Code § 102.012.

however, since this result does not impose an additional personal obligation on the terminated parent there is no constitutional right under *Kulko* to insist on personal jurisdiction.

### **Jurisdiction when there is no prior order.**

If there is no prior order and the child has been in Texas for six months,<sup>16</sup> the court with family jurisdiction where the child is found has plenary jurisdiction. There may, however, be a venue issue if the child does not reside in the county where “found” by CPS. Venue lies in the county where the child resides, and generally speaking that county is where the child’s parent lives, although different caretakers may sometimes establish the child’s residence.<sup>17</sup> If a suit for divorce is on file in a different county, the suit should be transferred to that county.<sup>18</sup> However, the court hearing the case under Chapter 262 is *not* required to transfer the suit until a final order is rendered in the CPS case.<sup>19</sup> The court hearing the CPS case may, however, as a matter of discretion transfer the suit to the court hearing the divorce suit or to another court in which a suit affecting the parent child relationship is pending, even if there is not yet a final order in either court.<sup>20</sup>

### **Jurisdiction when there is a prior order in Texas.**

It has always been difficult to ensure stability and safety for children when jurisdictional conflicts combine with already volatile family relationships. Not too many years ago, Texas allowed trial courts in different parts of the state to revisit custody orders with little regard for prior decisions. Before adoption of the Texas Family Code, which became effective on January 1, 1974, it was possible, and not uncommon, to re-litigate custody by filing or defending a *habeas corpus* proceeding in the “home town” of the dissatisfied non-custodial party to a prior order. The same problems existed in interstate cases, where the “home town” of one litigant was in a different state from that of the other.

Texas, and many other states adopted the concept of “Continuing Exclusive Jurisdiction” (CEJ), whereby the first court with jurisdiction to render a final order in a suit affecting the parent-child relationship for managing conservatorship, possessory conservatorship, possession and access or child support, retained control over the case unless the matter was properly “transferred” to another court. In Texas, if a court in which a suit is filed determines that another court has continuing exclusive jurisdiction of the child and the case has not been or cannot be transferred, the suit must be dismissed.<sup>21</sup> Of course, these rules could only control jurisdictional conflicts between Texas courts. Courts of other states could not be bound by Texas law.

Although the CEJ concept applies to child protective services suits, special provisions allow the CPS suits to proceed without undue difficulty in spite of the existence of a court of continuing jurisdiction. The court hearing the case under Chapter 262 is granted concurrent jurisdiction with the CEJ court through a specific exception in the CEJ statute.<sup>22</sup>

The Family Code requires the department, *after the full adversary hearing*, to request identification of a court of continuing jurisdiction if the court has rendered a temporary order.<sup>23</sup> If a court of continuing exclusive jurisdiction is identified, the Chapter 262 court on the motion of any party or on its own motion may: (1) transfer the suit to the court of continuing, exclusive jurisdiction, if any; (2) if grounds exist for mandatory transfer from the court of continuing, exclusive jurisdiction under Section 155.201, order transfer of the suit from that court; or (3) if grounds exist for transfer based on improper venue, order transfer of the suit to the court having venue of the suit under Chapter 103.<sup>24</sup>

<sup>16</sup> Texas is the child’s “home state” if the child “lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” Tex. Fam. Code § 152.102(7). The child’s “home state” has jurisdiction under the UCCJEA. Tex. Fam. Code § 152.201(A)(1).

<sup>17</sup> Tex. Fam. Code § 103.001.

<sup>18</sup> Tex. Fam. Code § 103.002.

<sup>19</sup> Tex. Fam. Code § 262.203(c).

<sup>20</sup> See “jurisdiction chart” at the end of this appendix.

<sup>21</sup> Tex. Fam. Code § 155.102.

<sup>22</sup> Tex. Fam. Code § 155.001(c): “no other court of this state has jurisdiction of a suit with regard to that child except as provided by this chapter or Chapter 262.”

<sup>23</sup> Tex. Fam. Code § 262.202.

<sup>24</sup> Tex. Fam. Code § 262.203(a).

Transfer is mandatory if the child has resided in the county where the Chapter 262 suit is filed for six months or longer.<sup>25</sup> Chapter 155 requires that a motion to transfer be filed (1) in the CEJ court, (2) with the initial pleadings or within the time for filing an answer.<sup>26</sup> However, “a motion to transfer relating to a suit filed under [Chapter 262] may be filed separately from the petition and is timely if filed while the case is pending.”<sup>27</sup> Chapter 155 also requires the CEJ court to order the transfer or, if a controverting affidavit is filed, hold a hearing and issue an order.

When the motion to transfer alleges grounds for mandatory transfer, the Chapter 262 court, *not* the CEJ court holds the hearing and orders the transfer “in accordance with procedures provided by Chapter 155.”<sup>28</sup> The reference to Chapter 155 procedures means that a party opposing the transfer must file an affidavit challenging the factual statements of the motion to transfer.<sup>29</sup> Each party to a contested transfer motion is entitled to notice of not less than 10 days before the date of the hearing.<sup>30</sup> If no controverting affidavit is filed, the court should grant the transfer without a hearing.<sup>31</sup>

The Chapter 262 court’s transfer order should direct the clerk of the CEJ court to transfer the files and child support registry records in accordance with Chapter 155.<sup>32</sup> Any “party may file the transfer order with the clerk of the court of continuing, exclusive jurisdiction. On receipt and without a hearing, the clerk of the court of continuing, exclusive jurisdiction shall transfer the files as provided by this subchapter.”<sup>33</sup>

If the transfer is not mandatory under the code, the CEJ court may still consider a motion to transfer on discretionary grounds. The court exercising CEJ also has broad discretion to transfer the case to another county even if “it is shown that the child has resided in [the other] county for less than six months at the time the proceeding is commenced,” for “the convenience of the parties and witnesses and in the interest of justice.”<sup>34</sup> The discretion to send the case elsewhere lies with the court having primary, not “emergency” jurisdiction. The discretion permitted by this provision is seldom exercised in Texas; most cases will be decided on the basis of the child’s actual residence for the six months prior to commencement of the proceeding.

One final difference between the transfer rules outside the CPS system and those under Chapter 262 relates to divorces. Normally, a SAPCR suit must be transferred on motion to the court in which a divorce suit has been filed. Chapter 262 provides that: “Notwithstanding Sections 6.407 and 103.002, a court exercising jurisdiction under this chapter is not required to transfer the suit to a court in which a parent has filed a suit for dissolution of marriage before a final order for the protection of the child has been rendered under Subchapter E, Chapter 263.”<sup>35</sup> In other words, the SAPCR portion of the suit for dissolution must wait for final action by the Chapter 262 court, which may include termination of parental rights. If parental rights are terminated in the CPS suit, the children should be dismissed from the divorce case.

Temporary orders under Chapter 262 are valid, and a final order rendered by a court with a Bureau of Vital Statistics (BVS) report showing no other court has continuing, exclusive jurisdiction is protected by statute.<sup>36</sup> However, a final order rendered without a clean report from the BVS is voidable on a showing that a court other than the court that rendered the order had continuing, exclusive jurisdiction.<sup>37</sup> This possibility makes it critical for all attorneys in the CPS suit to ensure the continuing jurisdiction issue is properly addressed; a void order benefits neither the child nor the parties.

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25 Tex. Fam. Code § 155.201(b).

26 Tex. Fam. Code § 155.204(b).

27 Tex. Fam. Code § 262.203(b).

28 Tex. Fam. Code § 262.203(a).

29 Tex. Fam. Code § 155.204(d).

30 Tex. Fam. Code § 155.204(e).

31 Tex. Fam. Code § 155.204(c).

32 Tex. Fam. Code §§ 155.205 and 155.207.

33 Tex. Fam. Code § 155.204(i).

34 Tex. Fam. Code § 155.202.

35 Tex. Fam. Code § 262.203(c).

36 Tex. Fam. Code § 155.103(a).

37 Tex. Fam. Code § 155.104(b).

**Jurisdiction involving other states or foreign countries.**

Attempts to resolve jurisdictional conflicts between states included the Uniform Child Custody Jurisdiction Act (UCCJA), promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws and adopted by all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. Although the UCCJA solved some of the problems relating to interstate custody litigation, it failed to specify a clear priority for the various bases it provided to assert jurisdiction and did not include a “continuing jurisdiction” provision. As a result, courts in different states could, and did, make conflicting claims of jurisdiction over the same child.

The Congress of the United States stepped in with the Parental Kidnapping Prevention Act (PKPA) in 1981, directing the states to give “full faith and credit” to orders rendered in compliance with its principles. Those principles included top priority for “home state” jurisdiction for an initial child custody order. As defined in the federal statute, “home state” means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.<sup>38</sup> This definition was included almost verbatim in the new Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Under the UCCJEA, “home state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or a person acting as a parent is part of the period.<sup>39</sup>

The PKPA also provides that the state in which the child has resided for six months has the right to exercise its jurisdiction to the exclusion of a state in which the child had not resided for the required time. Perhaps more important, the PKPA provided for recognition of the continuing, exclusive jurisdiction of the state that made an initial custody determination under this “home state” provision, so long as that state claimed such jurisdiction and the child or any contestant continued to reside in that state.<sup>40</sup> Thus, the PKPA encouraged the spread of the continuing jurisdiction concept and the subsequent adoption of the UCCJEA.

Experience under the UCCJA and the PKPA paved the way for the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), promulgated in 1997 by the Uniform Law Commissioners. UCCJEA reconciles UCCJA principles with the PKPA by adopting both home state priority and exclusive continuing jurisdiction.

This new uniform law has replaced the UCCJA in forty eight states, the District of Columbia and the U.S. Virgin Islands, and has been introduced in the legislatures of Massachusetts and Vermont.<sup>41</sup> It should be kept in mind that, at least with respect to recognition of the orders under the full faith and credit clause of the U.S. Constitution, there is no practical difference between a UCCJA state with the PKPA and a state that has adopted the UCCJEA.

**Temporary jurisdiction.**

“Home state” jurisdiction under the UCCJEA requires that a child reside in Texas for six consecutive months prior to DFPS intervention, but a court can assume temporary jurisdiction if: (1) the child is present in the state and (2) has been abandoned or it is necessary in an emergency to protect the child because the child, a sibling or a parent is *subjected to or threatened with mistreatment or abuse*.<sup>42</sup>

The “home state” of a child has a limited form of what may be called “extended jurisdiction” to make an initial custody determination (or to modify a prior judgment from a third state relating to the child) for six months after the child’s departure from the state *if* “a parent or a person acting as a parent continues to live in the [former

38 28 U.S.C. § 1738A(b)(4) (1981)

39 Tex. Fam. Code § 152.102(7).

40 28 U.S.C. § 1738A(d)(1981).

41 Information available at the NCCUSL website, <http://www.nccusl.org>.

42 Tex. Fam. Code § 152.204 (emphasis added); *In re M.G.M.*, 163 S.W. 3d 191 (Tex. App. – Beaumont 2005, no pet.) (where Texas not children’s home state and litigation pending in Michigan, Texas court only authorized to issue emergency orders for protection).

home state].”<sup>43</sup> On the other hand, if both parents, as well as the child and any “person acting as a parent,” have abandoned the former home state, no custody suit can be commenced there.<sup>44</sup>

If there is no prior order and no proceeding begun in another state, an emergency order rendered by a Texas court remains in effect until a state with jurisdiction under the UCCJEA issues an order. If that does not occur, an order issued by the Texas court can become a final child custody determination if the court so indicates and Texas becomes the child's home state.<sup>45</sup> By definition, the person awarded “legal custody” of the child in the emergency jurisdiction court is a “person acting as a parent” for the purpose of establishing a new home state.<sup>46</sup> Therefore, when the child has lived in the emergency order state with the court-appointed temporary custodian for more than six months *and* the potential jurisdiction of the former home state has not been invoked by “commencement of a proceeding” in that state within six months of the child's departure, the extended “home state” jurisdiction will be lost.<sup>47</sup> The court may also order a party to the case to appear “with or without the child” and “enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.”<sup>48</sup> In spite of these provisions, some courts have interpreted the home state provision as denying subject matter jurisdiction to a Texas court when the facts establish another state as the “home state,” even if no action has been or is likely to be filed in the other state.<sup>49</sup>

Unlike the situation when a prior custody order in the former state exists, the “emergency jurisdiction” court is under no duty to “communicate” with the other state's court about the matter until a suit is filed in the former “home state” — thus establishing a court with which to communicate. See *In re Jeffries*, 979 S.W.2d 429, 437-8 (Tex. App. – Waco 1998, orig. proceeding) (interpreting the UCCJA as permitting the trial court to exercise “default jurisdiction” when no action was filed in the former home state). On the other hand, the court exercising emergency jurisdiction may decline jurisdiction on inconvenient forum grounds<sup>50</sup> or on finding that a party seeking to invoke its jurisdiction has “engaged in unjustifiable conduct” — for example, concealing the child for the purpose of depriving the other state of jurisdiction.<sup>51</sup> If the emergency jurisdiction court chooses to send the case back to the former “home state,” temporary orders should provide protection for the child until proceedings can be commenced in the former home state.

In summary, if “emergency jurisdiction” orders are entered in the state in which the child is found, the potential jurisdiction of the previous “home state” must be invoked within six months of the child leaving that state and “a parent or person acting as a parent” must continue to live in that state. Both circumstances are required to invoke extended “home state” jurisdiction for an initial custody determination.<sup>52</sup> Otherwise, the “emergency jurisdiction” court may issue a valid final order relating to custody of the child.

### Temporary orders while enforcing sister-state judgments.

If there is a prior order in another state, the enforcement provisions of the UCCJEA allow the court to take physical possession of a child to prevent the child's removal from the state until a contest with respect to the right to possession or custody can be resolved.<sup>53</sup> The order must be limited to such time period as the court believes necessary “to allow the person seeking an order to obtain an order from the state having jurisdiction” to modify the prior custody order.<sup>54</sup>

<sup>43</sup> Tex. Fam. Code § 152.201(a)(1); Tex. Fam. Code § 152.203.

<sup>44</sup> *see* Tex. Fam. Code § 152.201(a)(1) (“home state” has jurisdiction only if “a parent or person acting as a parent” continues to reside (“live”) there).

<sup>45</sup> Tex. Fam. Code § 152.204 (b).

<sup>46</sup> Tex. Fam. Code § 152.102(13).

<sup>47</sup> Tex. Fam. Code § 152.201(a)(1).

<sup>48</sup> Tex. Fam. Code § 152.210.

<sup>49</sup> Tex. Fam. Code § 152.102 (7); § 152.201(a)(1). *See Ruffier v. Ruffier*, 190 S.W. 3d 884 (Tex. App. – El Paso 2006, no pet.) (child's residence with grandmother in Belarus for more than six months prior to filing of SAPCR precludes Texas “home state” jurisdiction). *But see* criticism of *Ruffier* in *International Child Issues and the Hague Convention*, Charles G. Childress, State Bar of Texas 33rd Annual Advanced Family Law Course, Chapter 32 (August 2007); *see also In re marriage of Stewart and Vulliet*, 867 N.E.2d 226 (Ind. App. May 30, 2007) (the UCCJEA “home state” rules are not restrictions on *subject matter jurisdiction*, but restrictions on the *exercise* of jurisdiction in particular cases. As such, the right to have the matter tried in the child's home state can be, and in this case was waived).

<sup>50</sup> Tex. Fam. Code § 152.207.

<sup>51</sup> Tex. Fam. Code § 152.208.

<sup>52</sup> Tex. Fam. Code § 152.201(a)(1).

<sup>53</sup> Tex. Fam. Code § 152.311(a).

<sup>54</sup> Tex. Fam. Code § 152.204(c).



A court that is asked to enforce a sister state child custody determination lacks jurisdiction to modify that sister state decree, even if the child is “threatened with mistreatment or abuse” if returned to the person with custody, unless the state issuing the original custody decree has lost jurisdiction or declines to exercise jurisdiction over the case.<sup>55</sup>

### **UCCJEA continuing jurisdiction does not require a “final” order.**

Under the UCCJEA, a “child custody determination” need not be a “final” order of the rendering court.

“Child custody determination” means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or another monetary obligation of an individual.<sup>56</sup>

### **No transfer of case between states.**

When the prior order and the order for protection of the child are from *different states*, the concept of *transfer* of the case does not apply. A Texas court cannot “transfer” a case to a court of another state.<sup>57</sup> When courts in different states have potential or actual jurisdiction over a child custody suit, the matter must be resolved by the courts exercising or declining to exercise jurisdiction in accordance with the principles of the UCCJEA. If the trial courts reach different results on the issues, it is up to the appellate courts in the different states to resolve questions of jurisdiction.<sup>58</sup>

### **Court communication; dominant jurisdiction; modification.**

If the court making emergency orders is “informed” that proceedings are pending in the child’s former state after issuing initial temporary orders without an expiration date, the court must “immediately communicate” with the other court “to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.”<sup>59</sup>

The court exercising jurisdiction on grounds other than “emergency” has the primary right to determine where the case should be tried to final judgment. Only that court may decline to exercise its jurisdiction on “inconvenient forum” grounds or because of “unjustifiable conduct” on the part of the petitioner.<sup>60</sup>

There is, however, one very important exception to the dominant jurisdiction given the first court to issue an order under the UCCJEA. Even if there is a previous order (child custody determination) in another state, the court of a second state may exercise jurisdiction to modify the prior order if it “*determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state,*” and it has “initial determination” jurisdiction under the UCCJEA.<sup>61</sup> Thus, if Texas is the new “home state” of the child and *no party* to the prior custody determination remains in the former state, the Texas trial court may make the necessary findings and exercise jurisdiction to modify any aspect of the custody order.

## **Summary of CEJ and UCCJEA Rules: Practice Tips**

### **1. The Magic Time.**

For original proceedings and mandatory transfer of cases within Texas, as well as for determining “home state” jurisdiction with respect to a child residing in Texas regardless of the location of a parent, the paramount question is: “Where has the child resided for the past six months?” If the child has resided in Texas with a “parent or person

<sup>55</sup> Tex. Fam. Code § 152.203.

<sup>56</sup> Tex. Fam. Code § 152.102(3).

<sup>57</sup> *Coots v. Leonard*, 959 S.W.2d 299, 307 (Tex. App. – El Paso 1997, no writ).

<sup>58</sup> See *Interest of S.A.V.*, 837 S.W.2d 80, 88-9 (Tex. 1992) (interpreting Minnesota orders as declining jurisdiction); *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (no federal cause of action under PKPA, although appeal to the U.S. Supreme Court from conflicting state supreme court opinions may be available).

<sup>59</sup> Tex. Fam. Code § 152.204(d).

<sup>60</sup> Tex. Fam. Code §§ 152.207 & 152.208.

<sup>61</sup> Tex. Fam. Code § 152.203.



acting as a parent” for more than six months, Texas has home state jurisdiction unless there is a prior order from another state or one of the other limited exceptions applies. Even if there is a prior order, Texas can obtain jurisdiction to modify that order without going back to the prior state if the child and a parent or person acting as a parent have resided in Texas more than six months and no contestant still resides in the state that issued the prior custody order. If any party remains in the original state, this magic time period does not give Texas jurisdiction, but it may help persuade the original court to declare itself an “inconvenient forum” and decline jurisdiction.

## **2. The Impact of Pending Suits within Texas or the United States.**

A first-to-file rule applies to pending suits when more than one court has jurisdiction. Venue, however, follows the residence of the child for cases within Texas so that the court where the child resides has dominant jurisdiction except when a divorce petition “trumps” the general rule. With respect to interstate cases, an emergency petition can always be filed where the child resides, but the six month rule controls which state is permitted to issue a final order with respect to the child. Emergency jurisdiction is limited, but the emergency jurisdiction court is empowered to render a final order when there is no prior order and no action is commenced in the child's home state within the six month window.

## **3. The Impact of Prior Orders within Texas or the United States.**

A prior final order within Texas creates a court of continuing exclusive jurisdiction. A court exercising emergency jurisdiction under Chapter 262 cannot render a valid final order without resolving the jurisdictional conflict with the CEJ court by transfer.

A prior custody order from another state cannot be modified by a Texas court as long as the child, one of the parents or a custodian remains in the original state. A court rendering an emergency order under the UCCJEA must set a deadline for resolving the jurisdictional conflict either by the entry of appropriate orders in the original state or by obtaining an order declining jurisdiction from that state. Emergency temporary orders should be dismissed when appropriate orders are entered in the other state or when the deadline set in the emergency order passes.

If the child has resided in Texas more than six months and all parties to any prior out-of-state order have left the original order state, then Texas may modify the prior order. Upon entry of that modifying order, the Texas court becomes both the court of continuing exclusive jurisdiction with respect to all other courts in Texas and acquires exclusive continuing jurisdiction for interstate purposes under the UCCJEA.

## **International Cases**

The UCCJEA requires that a Texas court must “treat a foreign country *as if* it were a state of the United States for the purpose of applying [subchapter B (General Provisions) and C (Jurisdiction)].”<sup>62</sup> If the child custody law of a foreign country violates fundamental principles of human rights, the court is not required to apply Chapter 152.<sup>63</sup> The trial court must enforce “a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [UCCJEA]” as if the order was from a sister state, unless enforcement is excused by the human rights provision.<sup>64</sup>

Unfortunately, some courts have applied these provisions without recognizing the substantial differences between interstate and international approaches to family law, and in particular to protective services issues.

### **The “Hague Convention”**

The Hague Conference on Private International Law, founded in 1955, but with a diplomatic history going back to 1893, describes itself as “a melting pot of different legal traditions [that] develops and services Conventions

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<sup>62</sup> Tex. Fam. Code § 152.105(a).

<sup>63</sup> Tex. Fam. Code § 152.105(c).

<sup>64</sup> Tex. Fam. Code § 152.105(b).

which respond to global needs” with respect to international civil litigation. The Conference has published 37 conventions since 1951 that the various delegates have pledged to submit to their governments. Information on all the conventions is available at: [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php).

Like statutes drafted by the National Conference of Commissioners on Uniform State Laws within the United States (NCCUSL),<sup>65</sup> the laws proposed by the Hague Convention do not go into effect until they are adopted by relevant authorities in each affected state. Also like NCCUSL, most of the efforts of the Conference have been devoted to issues of private commercial litigation, with only a few proposals aimed at family law.

Of the 37 Hague Conventions, the United States has “ratified”<sup>66</sup> three, adopted one by “accession”<sup>67</sup> and “signed” but not ratified three others.

Of most substantive relevance to Family Law practitioners are the 1980 Convention on Child Abduction (XXVIII),<sup>68</sup> the 1993 Convention on Adoption (XXXIII),<sup>69</sup> and the 1996 Convention on the Protection of Children (XXXIV).<sup>70</sup> Of these three, only the 1980 Child Abduction Convention has been ratified by the United States. The Adoption convention has been signed on behalf of the United States, but has not been ratified, and is not in force; the United States has neither signed nor ratified the Convention on the Protection of Children. The three other Hague Conventions that are in effect between the United States and most other countries relate to Legalization (Apostille) of Public Records (XII), Service of Process Abroad (XIV) and Taking of Evidence (XX); text and status information on these three conventions are available at the Hague Conference web site.

Federal implementing legislation for the Child Abduction Convention is the International Child Abduction Remedies Act (ICARA).<sup>71</sup>

Since the 1980 Child Abduction Convention has been ratified as a treaty, it is the “supreme law of the land” without regard to any conflicting provisions of federal or state law.<sup>72</sup> This is significant because it means that the UCCJEA provision requiring the courts to apply the law “as if” the foreign country was a sister state of the United States must be modified to the extent that ICARA and the Hague Convention conflict with the UCCJEA, and they do in several respects.

“Treat[ing] a foreign country as if it were a state of the United States,” under Chapter 152, Family Code, for example, does not mean that the trial judge should apply “home state” jurisdictional principles in a Convention case.<sup>73</sup> The Convention applies “to any child who was *habitually resident* in a Contracting [nation] *immediately* before any breach of custody or access rights.”<sup>74</sup> An individual under the age of 18 is a “child” under the UCCJEA,<sup>75</sup> but the Convention does not apply if the child is 16 years of age or older, and a “mature” child may successfully object to return.<sup>76</sup>

The Convention is strictly limited to enforcement, and its applicability requires that there be a “wrongful” act of a parent, which is defined as follows:

“The removal or the retention of a child is to be considered wrongful where — *a*) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the [nation] in which the child was habitually resident immediately before the removal

65 Information available at: <http://www.nccusl.org/>

66 Member states “ratify” a convention by adopting it in accordance with local law – in the case of the United States by submission as a treaty to the Senate – and depositing evidence of the ratification with the Ministry of Foreign Affairs in the Netherlands.

67 Non-member states (at the time the convention is promulgated) may accede to the convention using the same process as ratification, but the “accession” does not become effective with any other particular country until that country has “accepted” the accession.

68 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

69 Signed by the United States on March 31, 1994, but never ratified, and not in force. See status table at: [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=69](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=69) (accessed June 7, 2007).

70 Never signed by the United States. See status table at: [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=70](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70) (accessed June 7, 2007).

71 42 U.S.C. §§ 11601-11610 (1988).

72 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. Art. VI (Supremacy Clause).

73 The result may or may not be the same as between states under the UCCJEA. See *Flores v. Contreras*, 981 S.W.2d 246, 250 (Tex. App. – San Antonio 1998, pet. denied) (holding that a child who had spent the first fifty days of his life in Mexico had established a habitual residence there).

74 Convention Art. 4 (emphasis added).

75 § 152.102(2) Tex. Fam. Code (2006). Note: The 1996 Convention on the International Protection of Children applies to children under 18 (Art. 2) and includes an emergency protection provision (Art. 11); although it is not yet “in force” in the U.S., it may be useful as an interpretive guide for international application of the UCCJEA.

76 Convention Art. 4 and Art. 13.

or retention; and *b*) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph *a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that [nation].”<sup>77</sup>

There is no requirement for a prior court order, or even that a suit be filed in the country of “habitual residence,” as a prerequisite to return under the Convention. However, the best proof of the existence of “rights of custody” is a court order, and the Convention provides that “prior to the making of an order for the return of the child, [a court may] request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention . . . .”<sup>78</sup>

It is very important to keep in mind that, unlike interstate cases under the UCCJEA, the mere existence of a custody order in the child's prior country does not deprive the court where the child is found of authority to consider the impact of return on the child, even in the absence of an “emergency” as that term would be used in an interstate case. If more than one year has elapsed since the date of the wrongful removal and the child “is now settled in its new environment,” the judge may decline to order the child's return.<sup>79</sup> Furthermore, regardless of the length of time since the child was removed, the court may refuse to order return if:

“the person, institution or other body which opposes its return establishes that — *a*) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or *b*) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”<sup>80</sup>

In reviewing a Hague Convention case, therefore, the focus should be on the child's age and “habitual residence” at the time the petition is being filed. “The Convention shall cease to apply when the child attains the age of 16 years.”<sup>81</sup>

If the trial court deems the child old enough to “take account” of the child's views, the child's refusal to go back to the country of “habitual residence” is sufficient to deny return.

We should not forget that the basis for recognition of foreign laws and court orders in an international context is the substantive law applicable by treaty, for example the Convention, or comity. The “full faith and credit” that must be accorded to acts of sister states under the United States Constitution has no applicability to the acts of other nations.<sup>82</sup> Our federal law in this context is ICARA, not the PKPA, and ICARA does not apply unless the United States and the foreign country are “convention partners.”

### Determining whether the Convention and ICARA apply.

Convention is not in force between any two states until **both** states have filed the appropriate documents agreeing to be bound by the convention. For example, both Belarus and the United States have ratified the Child Abduction convention. However, the two countries have not yet agreed to be “Convention partners” in State Department terms. Therefore, the convention is not in force between Belarus and the United States.<sup>83</sup> Relief under the Convention is not available unless the Convention is “in force” between the country in which the children are

<sup>77</sup> Convention Art. 3.

<sup>78</sup> Convention Art. 15.

<sup>79</sup> Convention Art. 12.

<sup>80</sup> Convention Art. 13.

<sup>81</sup> Convention Art. 4.

<sup>82</sup> *Diorinou v. Mezitis*, 237 F.3d 133, 139-40 (2d Cir. 2001).

<sup>83</sup> See status table, available at: [http://www.hcch.net/index\\_en.php?act=status.accept&mid=603](http://www.hcch.net/index_en.php?act=status.accept&mid=603) (accessed June 7, 2007).

“habitual residents” and the United States.<sup>84</sup> The Convention is in force between the United States and Mexico, Canada, most European and South American countries, Australia and New Zealand.

The Department of State is the “Central Authority”<sup>85</sup> for United States participation in the Convention and is required to produce an annual report on country compliance. The 2007 report provides statistical and anecdotal information about the operation of the convention.<sup>86</sup> As of April 2007, the State Department recognized 55 nations as “convention partners,” and planned to add six more by June 1, 2007.<sup>87</sup> The Central Authority, working through consular offices, provides some assistance in both Convention and Non-Convention cases. In 2006, nearly 35% of children recovered from other countries came from countries that are not designated as “Convention partners” by the Department of State.<sup>88</sup>

### Conclusion and Practice Tip.

The Hague Convention may or may not apply to any particular CPS case involving an international family. If the Convention and ICARA apply, neither the “home state” nor the jurisdictional guidance of the UCCJEA can be used without modification to determine the extent of the court’s jurisdiction over custody issues or the rights of the parties, particularly the children, with regard to custody or the right of “return” to the other country. Oddly, the simplistic approach sometimes taken by practitioners and courts to the UCCJEA provision that other countries should be treated “as if” they were sister states may lead some practitioners and judges to think that the court’s jurisdiction is more limited than it is. It is *not* necessary that a Texas court dismiss a SAPCR suit simply because a foreign country might, if it were a sister state, have “home state” jurisdiction under the UCCJEA and be entitled to “full faith and credit” enforcement of whatever order it may have entered. In this context, perhaps more than any other, it is imperative that the safety, protection and best interests of the children remain the paramount concern of the department, attorneys ad litem and the courts.

If the child is before the court, there cannot be a jurisdictional restriction on exercise of that jurisdiction for the protection and best interest of the child. While deference to foreign courts is appropriate in many cases, the UCCJEA is a uniform *state* law, and the reason we enforce the jurisdictional restrictions included in the act is because sister states do the same and our federal constitution makes recognition of sister state decrees mandatory. This rationale simply does not apply in the international context.

<sup>84</sup> When the evidence showed that the children were habitual residents of a nonsignatory nation, relief under the Hague Convention was not available. *In re David B. v. Helen O.*, 625 N.Y.S.2d 436, 574 (N.Y. Fam. Ct. 1995).

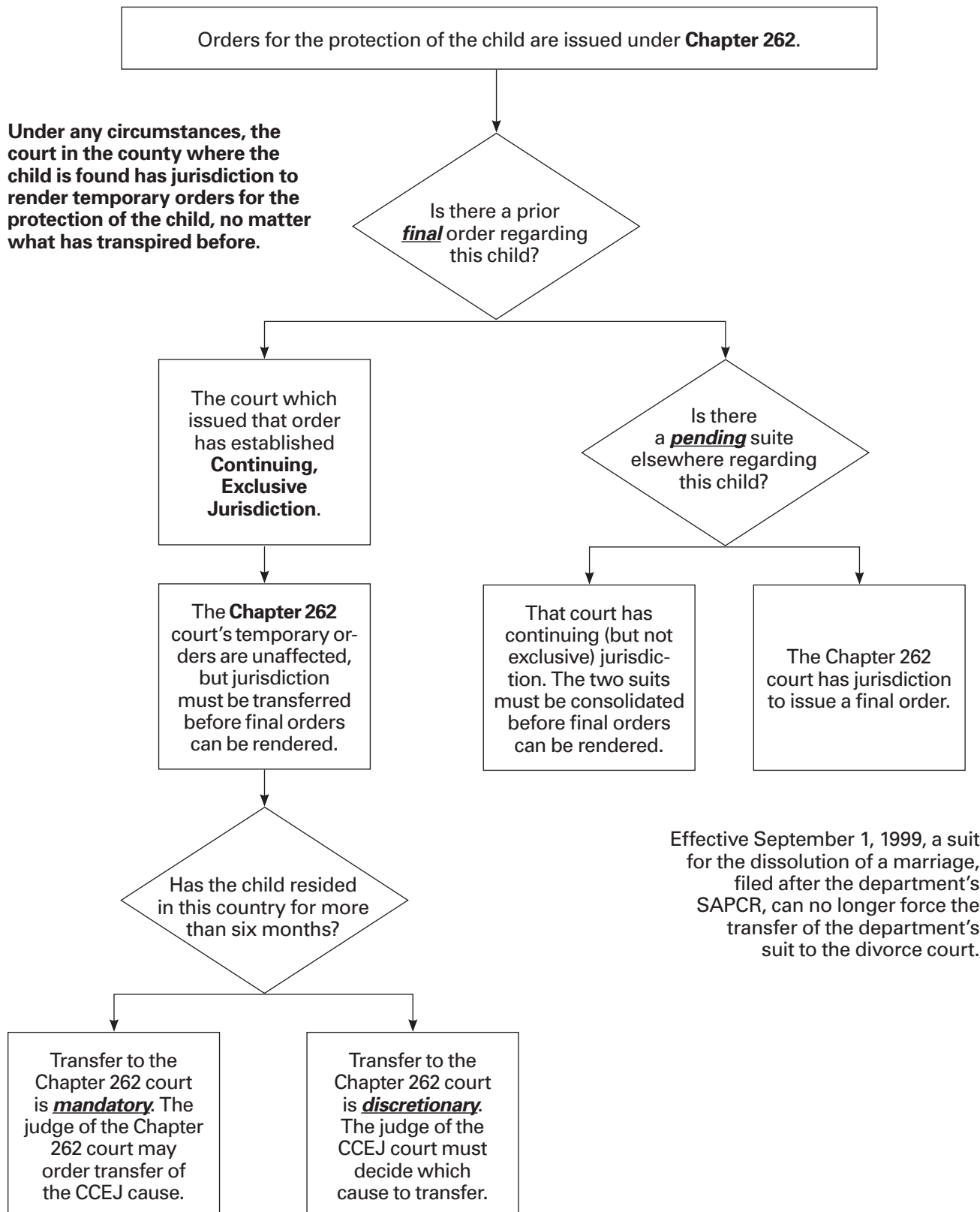
<sup>85</sup> Executive Order No. 12648 (August 11, 1988) 53 Fed. Reg. 30637.

<sup>86</sup> *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, April 2007*, available at: [http://travel.state.gov/pdf/child\\_abduction\\_Compliance\\_Report.pdf](http://travel.state.gov/pdf/child_abduction_Compliance_Report.pdf) (accessed June 11, 2007).

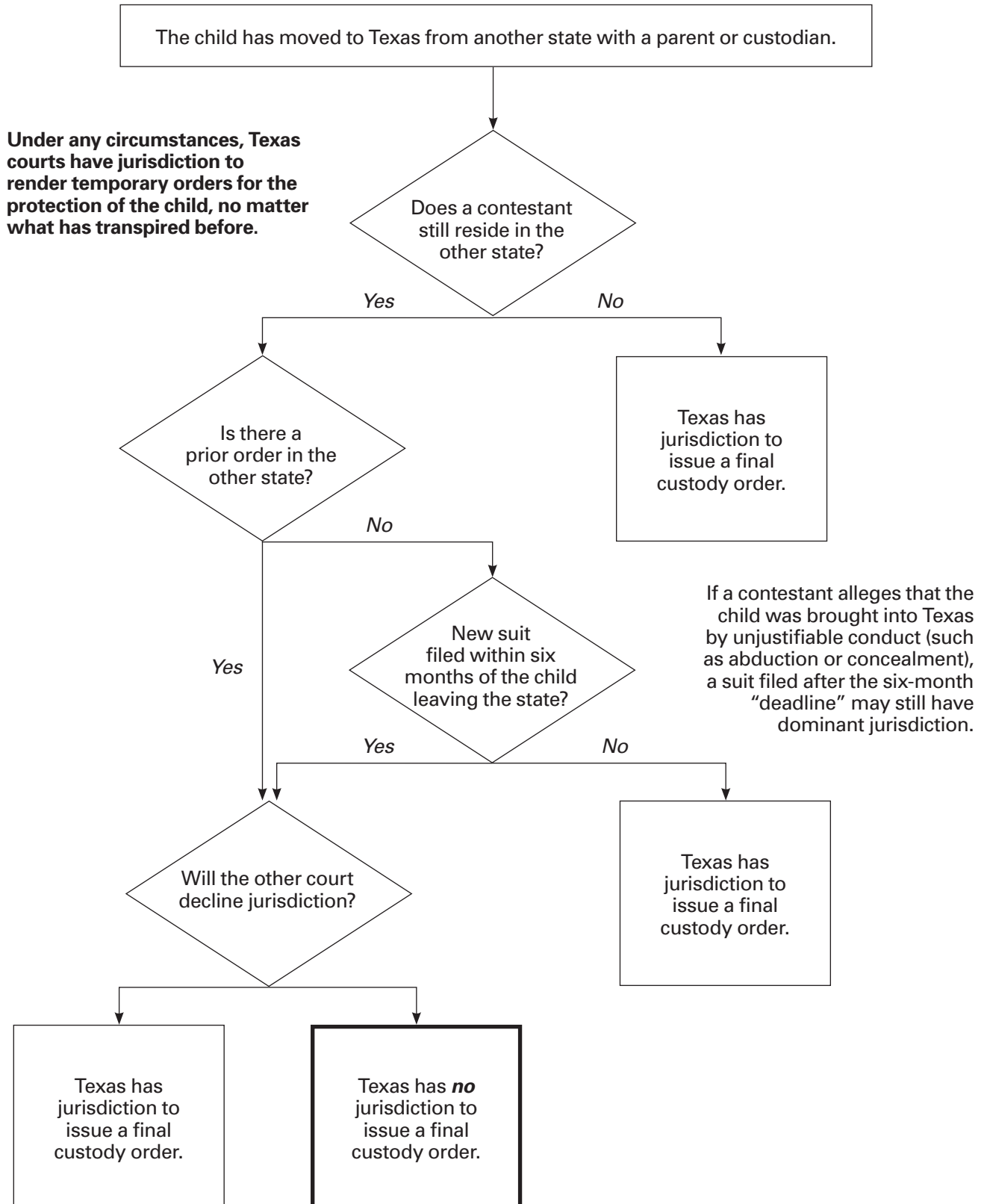
<sup>87</sup> *Id.* at page 43.

<sup>88</sup> *Id.* at page 5.

## Jurisdictional and Venue Decisions Involving the Court of Continuing, Exclusive Jurisdiction



## Jurisdictional Decisions Under the Uniform Child Custody Jurisdiction and Enforcement Act











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